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## Recent Developments in Montana Land Use Law

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## RECENT DEVELOPMENTS IN MONTANA LAND USE LAW

James H. Goetz\*

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### I. INTRODUCTION

During the last five years this nation has experienced a revolutionary change in attitudes toward environmental degradation. A

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\* B.A. Montana State University, 1965; J.D. Yale, 1968. The author would like to thank Dave Kinnard and Diane Rotering, third year law students, for the tremendous amount of assistance they provided in research and writing.

great deal of this heightened environmental concern has focused on issues relating to land use. The State of Montana with its vast open spaces, its scenic grandeur, and its relatively sparse population has escaped much of the environmental degradation resulting from poor land use suffered by other states. It is precisely because Montana has remained unspoiled that it is attractive to land developers and highly susceptible to the abuses of improper land use. Montana is also susceptible to environmental degradation from extractive industry because of the abundance of her natural resources, most notably coal and timber.

The heightened national sensitivity to problems of land use has been reflected in Montana. Based upon the National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> the state legislature adopted the Montana Environmental Policy Act of 1971 (MEPA).<sup>2</sup> The Montana Subdivision and Platting Act<sup>3</sup> was enacted in 1973 and has been substantially strengthened several times.<sup>4</sup> An important utility siting law was passed in 1973,<sup>5</sup> and upgraded to the Major Facility Siting Act in 1975.<sup>6</sup> Major strip mine reclamation and tax legislation has also been enacted in recent years.<sup>7</sup> These and other measures constitute a literal revolution in the land use law of Montana.

This survey article discusses some of the recent developments in Montana's land use law with particular emphasis on the attempts of the State to counter the adverse effects of population expansion, urban sprawl, and recreational development. The topics covered include subdivision review, the Montana Environmental Policy Act, taxation, realty transfers, annexation, zoning, natural areas, conservation easements, and lakeshore and streambed protection.

## II. SUBDIVISION REVIEW

Recreational and suburban land developments are creating major environmental problems in Montana, particularly in the scenic areas. Agricultural land is being consumed by development; urban and suburban sprawl are resulting in unsightly, haphazard growth patterns; and a good deal of land which is environmentally fragile is being degraded by thoughtless entrepreneurs. Prior to 1973, provision had been made for Department of Health review of water supply and sewage disposal systems for subdivisions contain-

1. 42 U.S.C. §§ 4321-47 (1970).

2. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], §§ 69-6501 through 6518 (Supp. 1975).

3. R.C.M. 1947, §§ 11-3859 through 3876 (Supp. 1975).

4. See discussion under topic of *Subdivision Review*, *infra*.

5. Laws of Montana (1973), ch. 327.

6. R.C.M. 1947, §§ 70-801 through 829 (Supp. 1975).

7. R.C.M. 1947, §§ 50-1034 through 1057 (Supp. 1975).

ing parcels smaller than five acres.<sup>8</sup> Other provisions contained in Montana statutes related to platting, surveying, and monumentation requirements for divisions of land,<sup>9</sup> and requirements for dedication of portions of certain subdivided lands to the public for park and playground purposes.<sup>10</sup> Until 1973, however, there was no legislation in Montana which purported to deal in a systematic or comprehensive manner with the adverse environmental and social effects associated with subdivision review.

### A. *Subdivision and Platting Act*

The Montana Subdivision and Platting Act,<sup>11</sup> enacted in 1973, was designed to regulate subdivision of land and "encourage development of land in harmony with the natural environment."<sup>12</sup> The Subdivision and Platting Act applied to the division of land into two or more parcels, any of which was ten acres or less. It directed the governing body of every county, city, or town to adopt subdivision regulations for the coordination of roads, provision of open spaces, provision of adequate water, sewage, and transportation facilities, minimization of congestion, avoidance of unnecessary environmental degradation and avoidance of development which would necessitate an "excessive expenditure of public funds" for the provision of public services.<sup>13</sup> The Act further directed the Department of Intergovernmental Relations to prescribe model subdivision rules<sup>14</sup> and provided that the regulations adopted by governing bodies of the local units must "meet or exceed the prescribed minimum requirements," established by the department.<sup>15</sup>

The most significant innovation of the Subdivision and Platting Act was the requirement that the subdivider submit an "environmental assessment" along with a "preliminary plat" as a prerequisite to approval by the governing body and the filing of a final subdivision plat.<sup>16</sup> The environmental assessment was to include a description of surface water, topography, vegetation, soil types, and

8. Laws of Montana (1967), ch. 197, §§ 148-152.

9. Laws of Montana (1973), ch. 500, § 20.

10. *Id.* The constitutionality of the park and playground dedication requirement was sustained in *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964).

11. R.C.M. 1947, §§ 11-3859 through 3876 (Supp. 1975).

12. Laws of Montana (1973), ch. 500, § 2. The 1975 amendment substituted the word "require" for the word "encourage."

13. *Id.*, § 5.

14. *Id.* The present regulations are in MONTANA ADMINISTRATIVE CODE [hereinafter cited as MAC] §§ 22-2.4B-S410 through 22-2.4B(30)-S4100. Also note that the Department of Intergovernmental Relations has been renamed the Department of Community Affairs.

15. Laws of Montana (1973), ch. 500, § 5.

16. *Id.*

their suitability for proposed development, wildlife use within the proposed subdivision, and available groundwater information. A community impact report containing a statement of the proposed subdivision's anticipated need for local services including education, busing, roads and maintenance, water sewage, solid waste facilities, fire and police protection was also required.<sup>17</sup> Upon submission of the preliminary plat and environmental assessment by the subdivider, the governing body must hold a public hearing,<sup>18</sup> after notice by publication. Based upon "all relevant evidence relating to the public health, safety and welfare," including the environmental assessment, the plat was to be approved, conditionally approved or disapproved by the governing body.<sup>19</sup> If the preliminary plat was conditionally approved or rejected, the governing body was required to provide the subdivider with a list of conditions to be met or reasons for rejection. Any approval or conditional approval after the public hearing was to remain in effect for one year<sup>20</sup> during which time the subdivider was to submit his final subdivision plat for approval and filing. Sales, leases or transfers of subdivided land were prohibited prior to the filing of a final subdivision plat with the county clerk and recorder.

The environmental assessment and plat review requirements of the Subdivision and Platting Act contained a provision allowing summary review and approval of minor subdivisions—those containing five or fewer parcels which all front on an existing public road.<sup>21</sup> The previous Montana laws dealing with plats, surveys, and park and playground dedication<sup>22</sup> were replaced by various provisions of the Subdivision and Platting Act. The previously existing requirement that subdividers dedicate one-ninth of the land to be developed to the public for parks and playgrounds<sup>23</sup> was retained with modification.<sup>24</sup> New surveying and monumentation standards for plats and certificates of survey were also established by the Subdivision and Platting Act.<sup>25</sup>

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17. *Id.*

18. This hearing responsibility could be delegated to an agent or agency designated by the governing body and acting in an advisory capacity. *Id.*, § 8.

19. *Id.*

20. This period could be extended for one (1) additional year. *Id.*

21. Other less notable exemptions from the environmental review requirements of the Act were: divisions created by court order; divisions created by lien; divisions created by the creation of an interest in oil, gas, minerals, or water; divisions creating cemetery lots, leases or rentals for agricultural programs; and, divisions for the purpose of a gift to the landlord's immediate family.

22. *Id.*, § 20.

23. Laws of Montana (1973), ch. 500, § 20.

24. *Id.*, § 6.

25. *Id.*, §§ 2-14.

### B. *Sanitation in Subdivisions Act*

The 1973 legislative session also enacted amendments to the Sanitation in Subdivisions Act.<sup>26</sup> These amendments expanded the authority of the Montana Department of Health & Environmental Sciences to review subdivision plats. The previous act of 1967 provided that any subdivision plat filed with the county clerk and recorder was subject to sanitary restrictions and that no building or shelter which necessitated the supplying of water or sewage disposal facilities could be erected until the Department of Health & Environmental Sciences approved the subdivision plat.<sup>27</sup>

The 1973 amendments to the Sanitation in Subdivisions Act expanded the policy mandate of the Department to protect the quality of water “. . . for other beneficial uses, including uses relating to agriculture, industry, recreation and wildlife.”<sup>28</sup> The 1973 amendment also extended the jurisdiction of the Department of Health & Environmental Sciences to review solid waste disposal.<sup>29</sup> The definition of subdivision was amended from “less than five acres” to “ten acres or less” and thereby conformed to the Subdivision and Platting Act enacted in the same year.<sup>30</sup> The enforcement mechanism was strengthened slightly by the addition of language prohibiting the county clerk and recorder from filing a plat until certification by the Department of Health & Environmental Sciences that the sanitary restrictions had been removed.<sup>31</sup> The occupancy of any permanent building or the disposition of any lot was also prohibited until the sanitary restrictions had been removed.<sup>32</sup>

### C. *1974-1975 Amendments*

The enactment of the Subdivision and Platting Act and the amendment of the Sanitation in Subdivisions Act in 1973 established the foundation for the present dual system of subdivision review in Montana. Important amendments were made, particularly to the Subdivision and Platting Act, in both the 1974 and 1975 legislative sessions, but the basic approach to subdivision review instituted by the 1973 legislation remains the same.

In the 1974 legislative session, the definition of “subdivision” contained in the Subdivision and Platting Act was changed from a division of land, “any parcel of which is ten acres or less,” to a

26. R.C.M. 1947, §§ 69-5001 through 5009 (Supp. 1975).

27. Laws of Montana (1967), ch. 197, § 150.

28. R.C.M. 1947, § 69-5001 (Supp. 1975).

29. R.C.M. 1947, § 69-5003 (Supp. 1975).

30. Laws of Montana (1973), ch. 509, § 2.

31. R.C.M. 1947, § 69-5003(2)(b) (Supp. 1975).

32. R.C.M. 1947, § 69-5003 (Supp. 1975).

division of land "which creates one or more parcels, containing less than twenty (20) acres."<sup>33</sup> The 1974 legislation left intact the Sanitation in Subdivisions Act resulting in the anomalous situation of having different definitions of subdivision: ten acres or less in the Sanitation in Subdivisions Act,<sup>34</sup> and less than twenty acres in the Subdivision and Platting Act.<sup>35</sup> The Sanitation in Subdivisions Act was amended, however, in 1975, to conform its definition of subdivision to that contained in the Subdivision and Platting Act.<sup>36</sup>

A major 1974 amendment to the Subdivision and Platting Act exempts from subdivision review divisions of land made for certain purposes, including relocation of a common boundary between adjoining properties, divisions for the purpose of a gift or sale to members of the landowner's immediate family, divisions in which the buyer and seller enter into a covenant running with the land that the divided land will be used exclusively for agricultural purposes, and a single division of a parcel when the transaction is an "occasional sale."<sup>37</sup>

In 1975, another major change was made which seeks to clarify the bases upon which the local governing bodies should approve or disapprove proposed subdivisions.<sup>38</sup> Prior to the 1975 amendment the local governing bodies had virtually no statutory standards to apply in deciding whether to approve or disapprove a subdivision:

The governing body . . . shall hold a public hearing on the preliminary plat and shall consider all relevant evidence relating to the public health, safety and welfare, including the environmental assessment, to determine whether that plat should be approved, conditionally approved, or disapproved by the governing body.<sup>39</sup>

This amorphous directive left the local governing body with nearly unlimited discretion to approve or reject a proposed subdivision. As such, the goals of the Subdivision and Platting Act—avoidance of unnecessary environmental degradation and the avoidance of development which would result in an excessive expenditure of public funds—were not well served. Nor was it possible for a subdivider to predict, based on some objective standard of review, whether his proposal would receive approval. There was simply no reasonably

33. R.C.M. 1947, § 11-3861(12) (Supp. 1975).

34. Laws of Montana (1973), ch. 509, § 149.

35. R.C.M. 1947, § 11-3861(12) (Supp. 1975).

36. See R.C.M. 1947, § 69-5002(1) (Supp. 1975).

37. R.C.M. 1947, § 11-3862(6)(a)-(d) (Supp. 1975). Occasional sale was defined in the 1974 amendments as "one sale of a division of land within any twelve month period." R.C.M. 1947, § 11-3861(13) (Supp. 1975).

38. R.C.M. 1947, § 11-3866(4) (Supp. 1975).

39. Laws of Montana (1973), ch. 500, § 9.

ascertainable standard of review provided in the Subdivision and Platting Act.

The 1975 amendments attempt to rectify this problem by requiring the local governing body to find the proposed subdivision to be in the "public interest" before approving it:

The basis for the governing body's decision to approve, conditionally approve, or disapprove a subdivision shall be whether the preliminary plat, environmental assessment, public hearing, planning board recommendations and additional information demonstrate that development of the subdivision would be in the public interest. The governing body shall disapprove any subdivision which it finds not to be in the public interest. To determine whether the proposed subdivision would be in the public interest the governing body shall issue written findings of fact that weigh the following criteria for public interest:

- (a) the basis of need for the subdivision;
- (b) expressed public opinion;
- (c) effects on agriculture;
- (d) effects on local services;
- (e) effects on taxation;
- (f) effects on the natural environment;
- (g) effects on wildlife and wildlife habitat; and,
- (h) effects on public health and safety.<sup>40</sup>

The result of this attempt to establish more concrete standards is a definite improvement in the system of review. However, significant problems still exist. Under the new standards it remains the prerogative of the local governing body to *weigh* the various factors and to reach the decision to approve or reject. Although the new amendments specify categories of factors which must be considered and require that written findings of fact be made, the ultimate judgment will still be highly discretionary. Factors such as political influence with the local governing body will continue to be more important than the factors set forth in the Act.

#### D. *Problems and Recommendations*

There is a serious question concerning what role the courts will play in the implementation of the Subdivision and Platting Act. Certainly, the courts should have no difficulty reviewing failures to follow the Act's procedures. In terms of substantive implementation, however, there exists the difficult question involving the extent to which the courts can review the discretionary actions of other governmental bodies. This raises a substantial question as to the

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40. R.C.M. 1947, § 11-3866(4) (Supp. 1975).



effectiveness of the courts in insuring implementation of the Subdivision and Platting Act. It is clear that the Legislature, by enacting the 1975 amendments, intends governing bodies to engage in careful scrutiny of subdivision proposals with the goal of insuring that all such proposals are in the public interest. Defining the public interest, however, is a difficult task. The 1975 amendments contemplate a balancing approach whereby the local governing body *weighs* all of the factors and reaches a decision. If such decision is reviewable by the courts, what standard is to be applied—the vague “substantial evidence” test, the “arbitrary and capricious” test, or some other standard? In short, while the 1975 amendments were enacted to establish a meaningful standard by which subdivisions are to be reviewed, it remains to be seen how effective that standard will be.

A further problem of local government review of subdivisions concerns the quality of the environmental assessments. The Subdivision and Platting Act requires developers to submit environmental assessments.<sup>41</sup> The decision to approve or disapprove is to be made, at least in part, upon that environmental assessment.<sup>42</sup> There is, however, no requirement that the assessment be prepared by qualified and objective persons. Thus, the assessments are usually prepared by the subdividers themselves, resulting in self-serving conclusions which are of little value to the governing body in determining whether a proposed subdivision is in the public interest. A similar issue arises in the federal courts' application of the environmental impact statement requirement of the National Environmental Policy Act.<sup>43</sup> Some federal courts have determined that delegation of the task of preparing environmental impact statements to the applicants is inconsistent with the Act because such statements are likely to be self-serving. In *Greene County Planning Board v. Federal Power Commission*,<sup>44</sup> the Second Circuit Court of Appeals found such delegation to the applicant to be invalid. The court said:

The danger of the procedure, and one obvious shortcoming is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions. . . .<sup>45</sup>

The Subdivision and Platting Act does provide for recommendations on proposed subdivisions by local planning boards,<sup>46</sup> and to this extent the environmental assessments prepared by the subdividers can be evaluated somewhat independently. In most cases, how-

41. R.C.M. 1947, § 11-3863(3) (Supp. 1975).

42. R.C.M. 1947, § 11-3866(3), (4) (Supp. 1975).

43. 42 U.S.C. § 4332 (1970).

44. 455 F.2d 412 (2nd Cir.), *cert. denied*, 409 U.S. 849 (1972).

45. *Id.* at 420.

46. R.C.M. 1947, § 11-3866(3) (Supp. 1975).

ever, heavy reliance is placed upon the subdivider's environmental assessment.

The remedy for this problem lies in placing the entire responsibility for preparation of the environmental assessment in the hands of the local government. Legislation could be enacted providing for the assessment of a fee from the subdivider sufficient to cover the costs incurred by the local government in reviewing the subdivision proposal. Similar legislation presently exists which allows the Department of Health and Environmental Sciences to assess subdividers ". . . for services rendered in the review of plats and subdivisions. . . ."<sup>47</sup>

An additional problem with the Subdivision and Platting Act stems from the exemption of "occasional sales" from the subdivision review procedures. Occasional sale means "one sale of a subdivision of land within any twelve month period."<sup>48</sup> R.C.M. 1947, § 11-3862(6) provides that such single sales within a twelve month period are not subdivisions unless the disposition "is adopted for the purpose of evading this act." In practice most occasional sales are made, at least in part, for the purpose of evading the procedural requirements for subdivision review. Thus, the language restricting the occasional sales exemption to those cases in which the Act is not evaded appears meaningless. The occasional sales exemption has resulted in avoidance of the planning and environmental goals of the Subdivision and Platting Act. Since summary review procedures are already established for minor subdivisions (subdivision plats containing five or fewer parcels where proper access to all lots is provided),<sup>49</sup> there is no compelling need for the occasional sales provision. Because it results in avoidance of the important goals of the Subdivision and Platting Act, and because there is little justification for it, the occasional sales provision should be repealed.

Still another problem with the Subdivision and Platting Act is found in its definition of "subdivision." R.C.M. 1947, § 11-3861(12) defines subdivision as a division of land which creates one or more parcels containing less than twenty acres. The review provision of the Act has been avoided to some degree by the subdivision of land into twenty acre parcels. While adverse effects of this type of subdivision may be less serious than subdivision into smaller parcels, there are nevertheless some environmentally fragile areas where the twenty acre limit is simply not adequate. As it now stands, unless there is some system of local zoning in effect, the local government is powerless to regulate any land development activity which falls

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47. R.C.M. 1947, § 69-5005(1) (Supp. 1975).

48. R.C.M. 1947, § 11-3861(13) (Supp. 1975).

49. R.C.M. 1947, § 11-3863(5) (Supp. 1975).

outside the twenty acre definition of the Subdivision and Platting Act. There were alternate proposals in the 1975 Legislature to apply the review provisions of the Subdivision and Platting Act to all divisions of land regardless of size,<sup>50</sup> and to enlarge the definition of subdivision to forty acres.<sup>51</sup> Neither proposal passed. These proposals, or some variation of them, may well be re-introduced in the 1977 legislative session. Such strengthening of the definition of subdivision would result in overall enhancement of the local government's ability to accomplish the goals of the Subdivision and Platting Act—particularly the avoidance of unnecessary environmental degradation in areas which may be of critical importance.

A major difficulty with the Montana system of subdivision review stems from its dual nature. The Subdivision and Platting Act provides for review by the local government, while the Sanitation in Subdivisions Act calls for review by a state agency, the Department of Health and Environmental Sciences. While the specific statutory mandate of the Department of Health and Environmental Sciences is to review the water quality, sewage disposal, and solid waste aspects of the proposed subdivisions, this mandate has arguably been expanded by the Montana Environmental Policy Act,<sup>52</sup> to extend Departmental review to the whole gamut of environmental and social considerations.<sup>53</sup> The difficulty arises because of a lack of coordination in the application of the two acts. A subdivider, in order to get approval for the filing of his plat, must file with both the local government and the state department. A subdivider who applies for removal of sanitary restrictions in his subdivision must file with the Department a "preliminary plan" of the proposed subdivision together with "whatever information the developer feels necessary. . . ."<sup>54</sup> Within sixty days of such filing the Department must notify the subdivider that the material submitted is sufficient to make the determination as to sanitary restrictions or, if insufficient, what additional information is needed. After the Department has notified the developer that the information is sufficient,<sup>55</sup> the Department must take final action within sixty days, unless an environmental impact statement is required, in which case the final action is to be taken within 120 days of such notification. It is contemplated that most decisions of the Department regarding sanitary restrictions will be made within 120 days.

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50. H.B. 369, 44th Legislature, 2d Sess. 1975.

51. H.B. 652, 44th Legislature, 2d Sess. 1975.

52. R.C.M. 1947, §§ 69-6501 through 6518 (Supp. 1975).

53. See discussion of MEPA, *infra*.

54. R.C.M. 1947, § 69-5003(3)(a) (Supp. 1975).

55. *Id.*

The Subdivision and Platting Act provides less time for review by the local government:

The governing body shall approve, conditionally approve, or reject the preliminary plat within sixty (60) days of its presentation unless the subdivider consents to an extension of the review period.<sup>56</sup>

The time periods allowed for review by the two Acts are not synchronized. Nor is there any provision which precludes a subdivider from filing with the Department at a different time from his filing with the local government; the review schedules under the two Acts are entirely independent. Further, there is no provision in Montana statutes which explicitly compels coordination between the Department and the local governing bodies, either in the timetables or in the sharing of information and expertise.

There is a need for legislation to clarify the relationship between the Department of Health and Environmental Sciences and the local units of government in subdivision review. There is no reason these units should not work together more closely. Unnecessary duplication could be reduced, thus strengthening the overall review process. Aside from the lack of synchronization in the review timetables, there are no statutory obstacles to such coordination. Neither act purports to occupy the field of subdivision review and neither act has language pre-empting the field to the exclusion of the other. Nevertheless, there has been little evidence of systematic cooperation between the two units of government in the application of the subdivision review power. Explicit legislation requiring such cooperation, clarifying the respective roles of the units of government involved, and synchronizing the timetables for review may be required to rectify this problem.

A final note of caution is necessary concerning what may be reasonably expected of subdivision review legislation. Subdivision review is no panacea to the problem of land misuse in Montana, but merely one of the tools necessary for mitigation. Montana still lacks effective master plans. Zoning is rare in those rural areas most susceptible to environmental degradation. Without adequate planning and zoning aids, it is a difficult task for a local unit of government to make a reasonable decision as to which areas are suitable for development. Thus, while certain changes in the subdivision review process in Montana could result in improved environmental protection, attention must be ultimately focused upon more comprehensive approaches which seek lasting protection of the public's interest in preserving Montana's environmental integrity.

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56. R.C.M. 1947, § 11-3866(2) (Supp. 1975).

### III. MONTANA ENVIRONMENTAL POLICY ACT

One of the most significant environmental measures passed in the last decade is the Montana Environmental Policy Act (MEPA).<sup>57</sup> Enacted in 1971, MEPA is based almost verbatim on the National Environmental Policy Act of 1969 (NEPA).<sup>58</sup> MEPA recognizes that "each person shall be entitled to a healthful environment and that each person has the responsibility to contribute to the preservation and enhancement of the environment."<sup>59</sup> The policy declaration of the Act states in pertinent part:

(a) In order to carry out the policies set forth in this act, it is the continuing responsibility of the state of Montana to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs, and resources to the end that the state may—

- (1) fulfill the responsibilities of each generation as trustees of the environment for succeeding generations;
- (2) assure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our unique heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.<sup>60</sup>

MEPA directs that "to the fullest extent possible . . . the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in [this] Act. . . ."<sup>61</sup> Like the federal Act, MEPA requires state agencies to prepare an environmental impact statement on major actions of state government which could have significant effect on the environment:

- (b) all agencies of the state shall . . .
  - (3) include in every recommendation a report on proposals for projects, programs, legislation and other major actions of

57. R.C.M. 1947, §§ 69-6501 through 6518 (Supp. 1975).

58. 42 U.S.C. §§ 4321-47 (1970).

59. R.C.M. 1947, § 69-6503(b) (Supp. 1975).

60. R.C.M. 1947, § 69-6503(a) (Supp. 1975).

61. R.C.M. 1947, § 69-6504 (Supp. 1975).

state government significantly affecting the quality of the human environment, a detailed statement on—

- (i) the environmental impacts of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>62</sup>

### A. Beaver Creek South

In 1976, the first case involving MEPA reached the Montana Supreme Court. Significantly, this case involved a land use issue. The case, *Montana Wilderness Association v. Board of Health and Environmental Sciences*,<sup>63</sup> concerned the proposed removal by the Department of Health and Environmental Sciences of the sanitary restrictions for a proposed subdivision located in Gallatin County, Montana, known as "Beaver Creek South." The jurisdiction of the Department stemmed from the Sanitation in Subdivisions Act which directs the Department to review proposed subdivisions for water quality and availability, sewage disposal, and solid waste disposal.<sup>64</sup> Prior to its removal of the sanitary restrictions on Beaver Creek South, the Department prepared an environmental impact statement relating to its proposed action.<sup>65</sup> After the Department issued its final environmental impact statement (EIS), the Wilderness Association and others commenced an action seeking a permanent injunction against removal of the sanitary restrictions. The plaintiffs alleged a failure of the Department to comply with MEPA. Following the district court's issuance of a temporary restraining order, the plaintiffs and defendant Department entered into a stipulation vacating a show cause hearing on the restraining order, and the Department revised its final EIS.

62. *Id.*

63. *Montana Wilderness Assn. v. Board of Health and Environmental Sciences* [hereinafter cited as *Beaver Creek*], 33 St.Rptr. 711 (July 22, 1976), *opinion withdrawn*, 33 St.Rptr. 1320 (December 30, 1976). Since the court's opinion of July 22d was withdrawn by the December 30th opinion, the former will in all likelihood never be reported except in the State Reporter. Therefore, for purposes of this article, the opinion of July 22d will be cited to the State Reporter only. It should be noted, however, that the entire majority opinion of July 22d was incorporated verbatim into the December 30th dissent of Justice Haswell. The author of this article was plaintiffs' counsel in that case.

64. R.C.M. 1947, §§ 69-5001 through 5009 (Supp. 1975); see discussion in section titled *Subdivision Review*, *supra*.

65. *Beaver Creek*, 33 St.Rptr. 711, 713 (July 22, 1976).

Subsequently, the district court granted summary judgment in favor of the plaintiffs, holding that the plaintiffs had standing to prosecute the action, that the revised EIS did not meet the procedural requirements of MEPA, and that the plaintiffs were entitled to injunctive relief.<sup>66</sup> The case was appealed to the Montana Supreme Court. On July 22, 1976, the court issued an opinion affirming the district court's grant of summary judgment for the plaintiffs.<sup>67</sup> In a strange turnaround, however, the court granted a rehearing of the case,<sup>68</sup> and on December 30, 1976, reversed its earlier position over the strong dissent of Justice Haswell.<sup>69</sup> Because of the evident weaknesses of the second decision and the recent change in personnel on the court,<sup>70</sup> the question of the proper application of MEPA remains unsettled. For this reason, the analysis of the opinion of July 22 merits extensive treatment along with the opinion of December 30, since the two opinions illustrate the sharp division on the court relative to the interpretation of MEPA.<sup>71</sup>

The majority opinion of July 22 framed the issues as follows:

1. Do plaintiff associations have standing to maintain this action?
2. Does the revised EIS satisfy the procedural requirements of the Montana Environmental Policy Act (MEPA)?
3. Are plaintiff associations entitled to injunctive relief?<sup>72</sup>

### 1. *Standing*

In asserting that plaintiff associations did not have standing to bring suit, the appellants argued the associations had suffered "no cognizable injury," "that any injury suffered or threatened is indistinguishable from the injury to the public generally," and "neither MEPA, the Montana Administrative Procedure Act, nor any other statute grants standing to these organizations to sue agencies of the state."<sup>73</sup> In response, the plaintiff associations urged the court to adopt the rationale utilized by federal courts in recent years which

66. District Court of First Judicial District, No. 38092, decided August 29, 1975.

67. *Beaver Creek*, 33 St.Rptr. 711 (July 22, 1976).

68. Montana Supreme Court, Order of September 28, 1976, No. 13179.

69. *Beaver Creek*, 33 St.Rptr. \_\_\_\_ (December 30, 1976). A separate dissent was also filed by Justice Daly.

70. Justice Castles dissented in part from the July 22d decision, and authored the opinion of December 30th. He lost his position in the 1976 general election and is no longer on the court. District Judge A. B. Martin was sitting by designation for Chief Justice James Harrison, and voted with the majority in both decisions. Thus, two out of the majority of three are no longer on the court.

71. The entire majority opinion of July 22d was incorporated verbatim in Justice Haswell's dissent of December 30th.

72. *Beaver Creek*, 33 St.Rptr. 711, 715 (July 22, 1976).

73. *Id.*

greatly liberalized standing in environmental actions.<sup>74</sup>

The supreme court, in its decision of July 22, found the federal cases inapposite and reviewed instead a number of Montana cases dealing with standing,<sup>75</sup> finding the following criteria sufficient to establish standing to sue in Montana:

- (1) The complaining party must clearly allege past, present or threatened injury to a property or civil right.
- (2) The alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.
- (3) The issue must represent a "case" or "controversy" as is within the judicial cognizance of the state's sovereignty.<sup>76</sup>

Based on these criteria, the July 22 decision held that plaintiff organizations had standing. It found that the complaint alleged a threatened injury to a "civil right" of the associations' members, namely the "inalienable . . . right to a clean and healthful environment" under Article II, Section 3 of the 1972 Montana Constitution.<sup>77</sup> The court summarized its holding on standing:

Finally, we reiterate these associations are citizen groups seeking to compel a state agency to perform its duties according to law. This concept is novel in Montana only insofar as it is raised here in the context of the state's explicit environmental policy. Were the associations denied access to the courts for the purpose of raising the issue of illegal state action under MEPA, the foregoing constitutional provisions and MEPA would be rendered useless verbiage, stating rights without remedies and leaving the state with no checks on its powers and duties under that Act. The statutory functions of state agencies under MEPA cannot be left unchecked simply because a potential mischief of agency default in its duties may affect the interests of citizens without the associations' membership. *United States v. SCRAP* [412 U.S. 669].<sup>78</sup>

## 2. *Environmental Impact Statement*

The second issue considered by the supreme court concerned the adequacy of the revised environmental impact statement. The developer, Beaver Creek South, maintained that MEPA had no bearing upon the Department's review of the proposed subdivision

74. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *United States v. Students Challenging Regulatory Agency Authority*, 412 U.S. 669 (1973).

75. *Holtz v. Babcock*, 143 Mont. 341, 390 P.2d 801 (1963); *State ex rel. Mitchell v. District Court*, 128 Mont. 325, 275 P.2d 642 (1954); *Chovanak v. Matthews*, 120 Mont. 520, 188 P.2d 582 (1948).

76. *Beaver Creek*, 33 St.Rptr. 711, 720 (July 22, 1976).

77. *Id.*

78. *Id.* at 721-22.



plat and that an environmental impact statement was not required. In the alternative both the Department and the developer strenuously argued that the Subdivision and Platting Act<sup>79</sup> preempted the field of subdivision review to the nearly complete exclusion of other legislation. According to this argument, if an EIS is required, it need only concern the environmental effects relating to water supply, sewage and solid waste disposal. The court, in its July 22 decision, rejected both arguments. As to the former, it should be noted that the Sanitation in Subdivisions Act contains an explicit reference to an EIS requirement.<sup>80</sup> The court rejected the latter argument finding that the objectives and procedures of the Subdivision and Platting Act are neither inconsistent with nor exclusive of the terms of MEPA. As authority for this finding the court cited R.C.M. 1947, § 69-6507: "The policies and goals set forth in this act [MEPA] are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state."<sup>81</sup>

The court held that the statutes must be read together as "creating a complementary scheme of environmental protection."<sup>82</sup> In reaching this conclusion, the court relied on several leading federal environmental cases. Significant reliance was placed on *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*.<sup>83</sup> In *Calvert Cliffs'*, regulations proposed by the AEC were challenged on the basis that they did not adequately provide for consideration of all environmental factors as mandated by NEPA. The AEC argued that its authority extended only to nuclear-related matters and that it was prohibited from independently evaluating and balancing environmental factors which were considered and certified by other federal agencies. The *Calvert Cliffs'* court found the AEC's interpretation of NEPA unduly restrictive and made the following statement which was cited with approval by the Montana Supreme Court in its July 22 opinion:

NEPA . . . makes environmental protection a part of the mandate of every Federal agency and department. The Atomic Energy Commission, for example, had continually asserted prior to NEPA, that it had not statutory authority to concern itself with the adverse environmental effects of its actions. Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account.<sup>84</sup>

79. R.C.M. 1947, §§ 11-3859 through 3876 (Supp. 1975).

80. R.C.M. 1947, § 69-5003(d) (Supp. 1975).

81. *Beaver Creek*, 33 St.Rptr. 711, 725 (July 22, 1976).

82. *Id.* at 726.

83. 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

84. *Beaver Creek*, 33 St.Rptr. 711, 727 (July 22, 1976).

Finding the EIS requirement of MEPA applicable to the Department of Health's function of subdivision review, the July 22 opinion addressed the question of the proper scope of judicial review of environmental statements under MEPA. Noting that the federal courts have framed the question in terms of whether NEPA is merely a "procedural" statute or whether it has a "substantive" mandate creating substantive duties reviewable by the courts, the Montana Supreme Court concluded that "because the District Court ruled on procedural grounds, we limit our inquiry to procedural matters."<sup>85</sup>

The supreme court affirmed in part the finding of the district court that the EIS prepared by the Department on the Beaver Creek Subdivision was procedurally inadequate. The supreme court found that the economic analysis of the subdivision prepared by the Health Department was particularly deficient, citing a joint resolution approved in the 1974 Montana Legislature.<sup>86</sup> That resolution states in part:

Whereas, it is a matter of serious concern to the Legislature that this enactment [MEPA] be fully implemented in all respects,  
NOW, THEREFORE, BE IT RESOLVED . . .

that all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of Section 69-6504 through 69-6514 . . . and

. . . that economic analysis shall accompany environmental impact statements as required by the foregoing sections of the Act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including consideration of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects. . . .<sup>87</sup>

### 3. *Injunctive Relief*

Having affirmed the district court's ruling that the revised EIS was procedurally inadequate, the July 22 opinion then turned to the question of whether the plaintiff associations were entitled to injunctive relief. The Department and the developer urged that an injunction was barred by statute:

An injunction cannot be granted:

. . . .

(4) to prevent the execution of a public statute, by officers of the law, for the public benefit.<sup>88</sup>

85. *Id.* at 728.

86. H.R.J. Res. No. 73, 43d Legislature, 2d Sess., 1974.

87. *Beaver Creek*, 33 St.Rptr. 711, 729-30 (July 22, 1976).

88. R.C.M. 1947, § 93-4203(4).

The supreme court's July 22 opinion rejected this argument, holding that a court may enjoin illegal actions by public officials. In support of this proposition, the court cited *Larson v. State*:

The preferable law is enunciated in *Hames v. City of Polson*, 123 Mont. 469, 479, 215 P.2d 950, where it was held:

" . . . Public bodies and public officers may be restrained by injunction from proceeding in violation of the law, to the prejudice of the public, or to the injury of individual right. . . ."<sup>89</sup>

Thus, the July 22 opinion stood as a landmark decision in Montana land use law—both because it was the first supreme court interpretation of MEPA, and because the decision established the standing of environmental organizations to seek judicial review of agency compliance with MEPA. The effect of that opinion was short-lived. In a bizarre change of position, the court reversed itself and issued a drastically different opinion on December 30, 1976, ruling that MEPA had only limited application, if any, to the process of subdivision review in Montana.<sup>90</sup>

The majority opinion of December 30 withdrew the earlier rulings on standing and injunctive relief and proceeded to decide the case on the merits. The opinion states:

The single determinative issue here is the function of the Department in land use decisions such as is involved in this case; that is, a simple subdivision plat. Other ancillary issues as to the 'standing' of the plaintiff associations to sue and the right to injunctive relief have been briefed and argued but need not be determined here because of our view of the law of Montana.<sup>91</sup>

Simply put, what the majority is saying is that it need not concern

89. *Beaver Creek*, 33 St.Rptr. 711, 735-36 (July 22, 1976); citing *Larson v. State*, 166 Mont. 449, 534 P.2d 854, 859 (1975).

90. *Beaver Creek*, 33 St.Rptr. 1320 (December 30, 1976). In the July 22d opinion, the court appeared to rule unanimously in favor of plaintiffs on the issue of standing. On the issue of whether the environmental impact statement was inadequate, the court split four to one, Justice Castles dissenting, ruling the EIS was indeed inadequate. Both Justices Castles and John C. Harrison dissented from the majority holding of July 22d that injunctive relief had been properly granted.

Upon request for rehearing, Justice Daly switched his position and sided with Justices Harrison and Castles in voting for the rehearing. Justices Haswell and Martin dissented from the grant of rehearing, stating that no new issues or matters had been presented on the petition for rehearing. Ironically, in the December 30th opinion, Judge Martin switched his position, voting with Justices Castles and J.C. Harrison for reversal on the substantive issue and Justice Daly, who had voted for the rehearing, dissented, stating that his "original objection to legal principles concerning standing to bring suit have not been discussed or answered." Significantly, not even Justices Castles (who was the only dissenting Justice regarding the issue of the adequacy of the EIS) raised the issue in his dissent of July 22d, on which the majority opinion turned on December 30, 1976.

91. *Id.* at 1324.

itself with the classic requirement of whether it is faced with a case or controversy prior to reaching a decision on the merits.

Proceeding to the merits the court held that the function of general subdivision review was vested exclusively in local governments by the 1973 Subdivision and Platting Act. The court stated:

Further analysis of the 1973 Subdivision and Platting Act will demonstrate unequivocally a legislative intent to place control of subdivision development in local governmental units in accordance with a comprehensive set of social, economic, and environmental criteria and in compliance with detailed procedural requirements.

Significantly, no similar mandate is given in the 1971 MEPA. Thus we conclude that the district court's reasoning, necessarily implied from its holding, that MEPA extends the Department's control over subdivisions beyond matters of water supply, sewage and solid waste disposal is in error as it is in direct conflict with the legislature's undeniable policy of local control as expressed in the Subdivision and Platting Act.<sup>92</sup>

Justice Haswell filed a heated dissent, accusing the majority of sidestepping the real issues, nullifying express state policy on environmental matters, and making a 180 degree turn from its original position. He stated: "The decision today deals a mortal blow to environmental protection in Montana. With one broad sweep of the pen, the majority has reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of local control."<sup>93</sup>

The essential fallacy of the majority approach lies in the premise that the legislature vested control of subdivision development in the local governments *to the exclusion* of state involvement. This is obviously not the case since the Department of Health and Environmental Sciences is directed by statute to review subdivisions<sup>94</sup> by the Sanitation in Subdivisions Act,<sup>95</sup> and that Act contains an express reference to the preparation of an environmental impact statement.<sup>96</sup> Furthermore, as recognized in the July 22 opinion, MEPA expressly states that its directives are supplementary to those set forth in existing authorizations of all state agencies.<sup>97</sup>

One of the most significant aspects of the December 30 opinion is its utter ignorance of federal court opinions under NEPA. Despite the fact that MEPA is based almost verbatim on NEPA and the federal construction is therefore presumed to be applicable to

92. *Id.* at 1325-26.

93. *Id.* at 1326 (dissenting).

94. R.C.M. 1947, § 69-5003 (Supp. 1975).

95. R.C.M. 1947, §§ 69-5001 through 5009 (Supp. 1975).

96. R.C.M. 1947, § 69-5003 (Supp. 1975).

97. See note 81, *supra*; R.C.M. 1947, §§ 11-3859 through 3876 (Supp. 1975).

MEPA,<sup>98</sup> and despite the wealth of federal cases decided under NEPA, the majority opinion cited not a single case in support of its analysis. Nor did it make even a passing attempt to distinguish federal case law brought to its attention.<sup>99</sup> The following language from the holding in the federal case, *Calvert Cliffs' Coordinating Committee v. AEC*,<sup>100</sup> is entirely inconsistent with the construction of MEPA rendered by the majority:

. . . [T]he purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in . . . [NEPA; Sec. 102(2)] *unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible* . . . Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language set out in section 102 is intended to insure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that *no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance*.

. . . .  
Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, *unless there is a clear conflict of statutory authority*. Considerations of administrative difficulty, delay or economic cost, will not suffice to strip the section of its fundamental importance. (emphasis supplied).<sup>101</sup>

There is no language in either the Sanitation in Subdivision Act<sup>102</sup> nor in the Subdivision and Platting Act<sup>103</sup> which "expressly prohibits or makes full compliance" with MEPA impossible. Rather, the Department utilized an "excessively narrow construction of its existing statutory authorization to avoid compliance" with MEPA. That excessively narrow construction has now been approved by the Montana Supreme Court.

The federal courts have faced an almost identical question in determining how the authority of the Corps of Engineers should be construed in relationship to NEPA.<sup>104</sup> The *Kalur* case interpreted

98. *Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 74 P. 197 (1903).

99. See Briefs of appellee and *amicus curiae*, Environmental Quality Council, on file in State Law Library, State Capitol, Helena.

100. 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

101. *Id.* at 1114-1115.

102. R.C.M. 1947, §§ 69-6501 through 6518 (Supp. 1975).

103. R.C.M. 1947, §§ 11-3859 through 3876 (Supp. 1975).

104. *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

the Rivers and Harbors Act of 1899 (Refuse Act),<sup>105</sup> which provided that it shall be unlawful to throw any refuse matter into a navigable water without a Corps of Engineers' permit. This is a water pollution control act systematically similar to the Montana statute in question here. That is, the government controls water pollution by a permit process. The Corps of Engineers argued in *Kalur* that because its authority is restricted to water quality, and such water quality questions are specifically governed by statute, no EIS is required. The *Kalur* court rejected this interpretation, stating:

Congress has provided that the Corps of Engineers may consult with other agencies and states before deciding, but it provided, in section 102(2)(c) [of NEPA] only for full consideration, *not an abdication to those other agencies or states*. It certainly did not grant a license to disregard the main body of NEPA obligations. There are no specific statutory obligations that the Corps of Engineers has that prevents it from complying with the letter of NEPA. . . . Obedience to water quality certifications under the Water Quality Improvement Act is *not mutually exclusive* with the NEPA procedures. *It does not preclude performance of NEPA duties*. Water quality certifications essentially establish a *minimum condition* for the granting of the license. But they need not end the matter. The Corps of Engineers can then go on to perform the very different operation of balancing the overall benefits and cost of a particular proposed project, and consider alterations above and beyond the applicable water quality standards that would further reduce environmental damage. (emphasis supplied).<sup>106</sup>

More recently, this same issue was raised in the federal courts regarding regulations promulgated by the Food and Drug Administration (FDA). In *Environmental Defense Fund, Inc. v. Mathews*,<sup>107</sup> the FDA promulgated an amendment to a regulation in connection with FDA's decision to authorize the use of non-returnable plastic beverage containers. The district court held that the regulation violates NEPA's mandate to federal agencies to take environmental considerations into account in their decisionmaking "to the fullest extent possible." An analysis of the specifics of that decision reveals a situation strikingly similar to that presented in Montana in the *Beaver Creek* case. The court summarized the facts in the *Mathews* case as follows:

In April, 1975, FDA promulgated an amendment to this regulation which is the subject of this action. Said amendment reads:

105. 33 U.S.C. § 407 (1970).

106. *Kalur v. Resor*, 335 F. Supp. 1, 14-15 (D.D.C. 1971).

107. 410 F. Supp. 336 (D.D.C. 1976).

'A determination of adverse environmental impact has no legal or regulatory effect and does not authorize the Commissioner to take or refrain from any action under the law he administers. The Commissioner may take or refrain from taking action on the basis of a determination of an adverse environmental impact only to the extent that such action is independently authorized by the laws he administers. 21 C.F.R. 6.1(a)(3).'

In effect, the amending regulation limits the grounds on which the Commissioner of FDA can base any action to those expressly provided for in the Food, Drug and Cosmetic Act, 21 U.S.C. § 301, et seq., (FDCA) or in other statutes which FDA administers. He is prohibited from acting solely on the basis of environmental considerations not identified in those statutes. This limitation of the agency's discretion to act in accordance with environmental considerations directly contravenes the mandate of NEPA to all Federal agencies to consider the environmental effects of their actions 'to the fullest extent possible.'

Defendants contend that FDA's statutes, particularly the FDCA, dictate that it act only in accordance with specifically expressed criteria, and that to the extent that NEPA demands consideration of additional criteria, it is in direct conflict with those statutes. Accordingly, they maintain that such a direct statutory conflict exempts FDA from full compliance with NEPA.<sup>108</sup>

This is similar to the position taken by the majority in the December 30 opinion in *Beaver Creek*. The majority found that the Sanitation in Subdivisions Act<sup>109</sup> dictates that the Health Department act only in accordance with specifically expressed criteria—sewage, solid waste, and water quality—and that to the extent MEPA demands consideration of additional criteria such as wildlife, highways, aesthetics and other factors, MEPA is in direct conflict with the specific enabling legislation of the department. The federal court in *Mathews* flatly rejected a similar contention of the FDA that their regulatory authority was limited by their specific enabling legislation. The court stated:

It appears clear to us that, contrary to defendants' contention, FDA's existing statutory duties under the FDCA and its other statutes are not in direct conflict with its duties under NEPA. The FDCA does not state that the listed considerations are the only ones which the Commissioner may take into account in reaching a decision. Nor does it explicitly require that product applications

108. *Id.* at 338.

109. R.C.M. 1947, §§ 69-5001 through 5009 (Supp. 1975).

be granted if the specified grounds are met. It merely lists criteria which the Commissioner must consider in reaching his decision. In the absence of a clear statutory provision excluding consideration of environmental factors, and in light of NEPA's broad mandate that all environmental considerations be taken into account, we find that NEPA provides FDA with supplementary authority to base its substantive decisions on all environmental considerations including those not expressly identified in the FDCA and the FDA's other statutes. This conclusion finds support in the legislative history, the precise statutory language, the holdings of the courts, and the construction adopted by other Federal agencies.<sup>110</sup>

These federal cases are very similar to the situation presented in Montana by the *Beaver Creek* decision. The question essentially concerns whether the state and federal environmental policy acts can be read in harmony with other specific statutes which authorize agency actions in various fields. The clear rule of construction arrived at in the federal courts in interpreting NEPA is that there is a strong mandate to implement NEPA and to harmonize the functions under NEPA with existing statutory authority unless the agency's specific statutory authority *explicitly precludes such harmonization*.

Furthermore, in considering whether the field of subdivision review was exclusively occupied by local government review, the court ignored the fact that the Montana Subdivision and Platting Act has been in existence since 1973, and that the counties have been reviewing subdivision proposals under its provisions for several years. The court also ignored the fact that there was an established history of such joint review by both the Montana Department of Health and Environmental Sciences and the counties. The history of such review reveals that state and local review of such proposals have been able to proceed jointly and, if not in harmony, not to the exclusion of each other. The finding in the opinion of December 30 is essentially that the Subdivision and Platting Act "preempts" the field of subdivision review. The preemption doctrine is not generally favored under the rules of statutory construction.<sup>111</sup>

The December 30 majority opinion goes out of its way to find a conflict between local review of subdivisions under the Subdivision and Platting Act and the review by the Department under the Sanitation in Subdivisions Act and MEPA. An impartial reading of

110. *Environmental Defense Fund, Inc. v. Mathews*, 410 F. Supp. 336, 338 (D.D.C. 1976).

111. In *State v. District Court*, 56 Mont. 464, 185 P. 157, 158 (1919), the supreme court stated: "The repeal of any of the provisions of the law is not to be presumed unless *irreconcilably repugnant*, or unless the latter revises the whole subject matter of the former." (emphasis supplied)



these measures reveals no such conflict. The opinion states that its analysis of the Subdivision and Platting Act demonstrates "unequivocally" a legislative attempt to place control of subdivision development in local governmental units. If this were accurate, it is difficult to understand why the legislature did not place the function of review of sanitary restrictions on the subdivisions in the hands of the county sanitarians instead of in the Department. The legislature, in enacting R.C.M. 1947, § 69-5003, explicitly provided for joint treatment of sanitary applications. Part of that section deals with processing applications through *local health officers and the Department*.

Ironically, even the Department, which was the defendant in the initial *Beaver Creek* action and the appellant before the supreme court, recognized that MEPA had a broader application than the interpretation reached by the supreme court. On February 26, 1976, the Department adopted regulations dealing with the preparation, content and distribution of environmental impact statements. One of those regulations<sup>112</sup> provided that the Department shall, in appropriate cases, prepare environmental impact statements which shall include, among other things:

1. A description of the impacts on the human environment of the proposed action;
2. A discussion of irreversible and irretrievable commitments of environmental resources, including land, air, water and energy;
3. An evaluation of the immediate and cumulative impact on the physical environment, including where appropriate: terrestrial and aquatic life and habitats; water quality, quantity and distribution; soil quality, stability and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy.

Another regulation of the Department requires specifically that compliance with MEPA be followed in the subdivision review process:

A certificate of approval will be issued where the Department is satisfied that water pollution will not occur, the water supply is of adequate quantity and acceptable quality, solid waste disposal is in accordance with state laws and rules, *and the requirements of the Montana Environmental Policy Act have been met.* (emphasis supplied).<sup>113</sup>

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112. MAC § 16-2.2(2)-P2040.

113. MAC § 16-2.14(10)-S14340(11)(e).

These specific regulatory provisions were ignored by the court in reaching its decision in *Beaver Creek*. Under the authority of MEPA and these regulations, the Department has been exercising its subdivision review function in conjunction with MEPA for over three years. This is reflected in the fact that the Department chose to prepare an impact statement on the proposed Beaver Creek South subdivision, and that such impact statement purported to cover a spectrum of environmental factors beyond water quality, sewage and solid waste disposal. The opinion of December 30 failed to consider this established administrative practice in interpreting the meaning of MEPA.

The Montana legislature has been aware for a number of years of the application of the MEPA process to the Department's subdivision review function. The acceptance of this practice by the legislature might well be construed as approval of this state level review.<sup>114</sup> The majority opinion of December 30, however, also fails to address this aspect of legislative acquiescence in the ongoing administration of the law by the Department.

In summary, MEPA, based on the federal model, was passed to insure that state agencies accomplish environmental protection to the "fullest extent possible." The federal courts have strongly mandated all federal agencies to implement NEPA by *supplementing* the existing agency authority unless explicitly precluded from doing so. The Montana Department of Health has adopted regulations applying MEPA to its function of subdivision review, and in those regulations, has determined that its environmental impact statements should consider environmental matters outside the specific provisions of the Sanitation in Subdivisions Act.

As noted in Justice Haswell's dissent from the December 30 opinion, the 1972 Montana Constitution elevated the right to a clean environment to the status of a fundamental constitutional right.<sup>115</sup> In spite of the importance of the question, and in spite of the wealth of applicable federal case law available to assist in interpretation, the supreme court majority opinion of December 30 ruled, essentially by fiat, without citing a *single* case and without attempting to distinguish the compelling adverse authority, that MEPA is virtually meaningless. Doubtless these issues will be raised again in the supreme court and hopefully the reasoned and authoritative dissent of Justice Haswell will eventually prevail.

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114. See *Butte Miners Union Local No. 1 v. Anaconda Copper Co.*, 112 Mont. 418, 118 P.2d 148 (1941).

115. MONT. CONST. art. II, § 3.

#### IV. THE IMPACT OF TAXATION ON LAND USE IN MONTANA

In recent years taxation has become an increasingly significant determinant of land use. High property taxes can discourage certain uses of land and can work, at least marginally, to change land use. A lowering of property taxes can operate as an incentive to desired land use. In recognition of the role of property taxes in land use, the Montana Legislature has enacted several taxation statutes aimed at land use over the past three legislative sessions.

Prior to 1973, the standard for appraisal of real property was essentially the market value of the highest and best use of the property.<sup>116</sup> In 1970, a case reached the Montana Supreme Court which involved a challenge by an agricultural user who objected to the computation of the assessed valuation of his land based on commercial (suburban) values rather than on agricultural values. In that case, *Mohland v. State Board of Equalization*,<sup>117</sup> the court held that the commercial classification of plaintiff's land was proper because the land would be more valuable as commercial property. The court relied on R.C.M. 1947, § 84-429.12:

It is evident that the "market value" is a proper basis upon which plaintiff's property has been assessed. The Board has selected the market value since the plaintiff's property, although used for agricultural purposes, is really more valuable as commercial (suburban) property as witnessed by the evidence adduced before the Board concerning verified sales, options, and offers to purchase the land. There obviously is a present demand for the land under consideration for a use that justifies a higher value that can be economically justified as agricultural use. So long as this is a "general and uniform method of classifying lands" in the state there can be no argument that it is an improper method of classification.<sup>118</sup>

This approach poses significant problems for the agricultural user who falls in the path of commercial development but who wishes to maintain his land in agricultural use. Under the *Mohland* rationale, a prohibitive property tax rate may deprive such user of that choice.

##### A. 1973 Property Tax Amendments

In response to this problem, the 1973 Legislature amended R.C.M. 1947, § 84-429.12(1) by adding the following paragraph:

All agricultural lands must be classified and appraised as agricul-

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116. R.C.M. 1947, §§ 84-401 and 402.

117. 155 Mont. 49, 466 P.2d 582 (1970).

118. *Id.* at 584.

tural lands without regard to the best and highest value use of adjacent or neighboring lands.

R.C.M. 1947, § 84-401 was also changed in 1973 by the insertion of an exception relating to agricultural lands. As amended, the section read:

All taxable property must be assessed at its full cash value except the assessment of agricultural lands shall be based upon the productive capacity of the lands when valued for agriculture purposes and shall be so valued unless a different use is demonstrated. Land and the improvements thereon must be separately assessed.

Provisions designed to implement the property tax relief policy for agricultural use were also enacted in 1973.<sup>119</sup> The legislative purpose was stated as follows:

Since the market value of many farm properties is based upon speculative purchases which do not reflect the productive capability of farms, it is the legislative intent that bona fide farm properties shall be classified and assessed at a value that is exclusive of values attributed to urban influences or speculative purposes.<sup>120</sup>

Although property tax law has been amended several times since 1973, the basic approach remains the same. As the law now stands, land of not less than five contiguous acres, which is actively devoted to agricultural use, and which was actively devoted to agricultural use during the past growing season, qualifies for assessment as agricultural property.<sup>121</sup> The 1973 property tax amendments provide that land is actively devoted to agricultural use if (1) it is used to produce field crops (including grains and feed crops), (2) it is used for grazing, or (3) it is in a crop land retirement program. Alternatively, land qualifies for agricultural assessment treatment regardless of size or contiguity if it "agriculturally produces for sale or home consumption the equivalent of fifteen percent (15%) or more of the owner's annual gross income. . . ."<sup>122</sup>

Land which has been in agricultural use and which has been assessed and taxed under the favorable agricultural use provisions is subject to a "roll-back" tax if changed from such agricultural use.<sup>123</sup> The term "roll-back" includes the period preceding such change in use, not to exceed four years, during which the land was assessed and taxed as agricultural land. The "roll-back" tax is computed by determining the average property tax the owner would

119. R.C.M. 1947, §§ 84-437.1 through 437.17 (Supp. 1975).

120. R.C.M. 1947, § 84-437.1 (Supp. 1975).

121. R.C.M. 1947, § 84-437.2(1)(a) (Supp. 1975).

122. R.C.M. 1947, § 84-437.2 (Supp. 1975).

123. R.C.M. 1947, § 84-437.4 (Supp. 1975).

have paid on such land during such period had the land not qualified as agricultural land and subtracting from that figure the taxes actually paid by the landowner during that period. The "roll-back" tax becomes due and payable at the time of the change in use.<sup>124</sup>

One of the purposes of the 1973 amendments was to remove the pressure, resulting from higher property taxes, to convert agricultural land to development land. In this sense the property tax would be a neutral factor in the decision whether to convert the land to other uses. The amendments are clearly successful in accomplishing this purpose. *Bona fide* agricultural land will be taxed as such under the amendments and agricultural users will not have to worry about a prohibitive property tax.

A further purpose underlying the tax amendments is evident. The "roll-back" tax provision indicates an intent either to discourage the agricultural landowner from converting land from agricultural use by assessing increased taxes on a retroactive basis or to penalize those landowners who take advantage of the favorable agricultural treatment while waiting for the propitious moment to develop. To the extent that the "roll-back" tax is designed to penalize a decision to convert agricultural land, it can be viewed as an attempt to reach land use goals.

Goals extraneous to the raising of revenue are often achieved by manipulation of the tax structure and taxation of land use is no exception. As discussed below, however, in the section on the Montana Economic Land Development Act,<sup>125</sup> the legislature has too often used taxation schemes to accomplish land use objectives and has too long avoided more sensible and more direct solutions to the problems of land use in Montana. In any case, there is little evidence to indicate that the agricultural property tax amendments of 1973 have effectively discouraged the conversion of agricultural land to development land. The "roll-back" period of four years is too short; the tax "penalties" are too small. An agricultural user tempted by the speculative development profits is not likely to be discouraged by the "roll-back" property tax, since the amount of the "roll-back" property tax is insignificant compared to anticipated profits. Nor is the speculator who files for an agricultural land classification while awaiting a favorable time to subdivide likely to be deterred by the insignificant "roll-back" tax. He has nothing to lose by requesting agricultural treatment. If he is denied the favorable agricultural assessment, he will be assessed at the highest and best use—presumably commercial development. If he takes advan-

124. *Id.*

125. See discussion of MELDA, *infra*.

tage of the agricultural assessment and develops his land later, he simply pays the "roll-back" taxes—taxes he would have paid anyway. Indeed, he may well pay less because the "roll-back" is only for a period of four years. In short, the tax amendments of 1973 have effectively removed the *Mohland* property tax deterrent to maintaining land in agricultural use but have fallen short of the goal of actively discouraging the conversion of agricultural land to development land.

### B. *Montana Economic Land Development Act*

The Montana Economic Land Development Act (MELDA) is a more ambitious attempt to employ the property tax system to accomplish land use objectives.<sup>126</sup> Adopted in 1975, MELDA is the first attempt by the Montana Legislature to develop a state-wide land use policy. In spite of its laudable goal, it is a failure. The first sentence in the policy statement reads:

The legislature finds that we as a state are currently facing problems in our economic development that will not only cause concern to our state's future but also cutbacks in our state's growth and currently lack to proper development. (*sic*)<sup>127</sup>

Unfortunately, this introduction to the Act is only slightly less intelligible than its operative provisions.

#### 1. *Provisions of MELDA*

MELDA attempts many things. It attempts to encourage industrial and commercial development while concurrently attempting to solve land use problems. It purports to establish a state-wide land use policy but seeks to preserve local autonomy in land use decisions. MELDA attempts to encourage beneficial land use planning, not through the traditional regulatory approach, but rather by means of a complicated system of property tax incentives and penalties. The Act, according to its stated purpose, "is designed to meet Montana's needs in a unique way; by reducing the need for zoning and other land control measures and placing our future development under a free market system controlled not by land regulation, but by economics."<sup>128</sup> MELDA has not yet been implemented. Its provision establishing an "effective date"<sup>129</sup> is so tortured that it is doubtful the Act will ever be implemented. This is perhaps the one saving grace in the Act.

126. R.C.M. 1947, §§ 84-7501 through 7526 (Supp. 1975).

127. R.C.M. 1947, § 84-7502 (Supp. 1975).

128. R.C.M. 1947, § 84-7503 (Supp. 1975).

129. R.C.M. 1947, § 84-7526 (Supp. 1975).

MELDA is premised upon the development of land use plans by all cities and towns throughout the state;<sup>130</sup> a jurisdiction need not prepare a new plan if the existing zoning classification system conforms to the provisions of the Act.<sup>131</sup> The land use plans must be prepared in accordance with specific procedures set forth in R.C.M. 1947, § 84-7505, and after adoption must be submitted to the "state administrative agency"<sup>132</sup> no later than January 1, 1978. If a city or county fails to prepare such a plan within that time the Department of Community Affairs will complete the preparation. The prepared plan, or extant classification system, may utilize only six specific categories of land use.<sup>133</sup> Once a plan is developed in this manner the local governing body<sup>134</sup> may either proceed with further implementation of the classification plan or submit the question of further implementation to an "election" within the affected land area.<sup>135</sup> If the electors reject further implementation, the plan may not be implemented and no new election may be held on that or any other plan for one year. Once a local governing body adopts a plan for land classification, the State Department of Revenue conducts hearings on the proposed classifications, and after considering the record of such hearings, makes the final classification of land.<sup>136</sup> This final classification will be that proposed by the local governing body only if such classification proposals accord with specific criteria provided for each of the six categories of land classification.<sup>137</sup>

The voter option provision, which gives the local governing body the option of itself implementing a classification or of submitting the question of implementation to the voters, does not specify what happens if the voters reject the proposed classification plan. It is clear that if a plan is rejected, no new plan may be implemented for one year. If voters continue to reject the plans, the Act apparently will not be implemented. Thus, implementation of the substantive provisions is not mandatory and the Act's goal that the "state should develop a land use policy"<sup>138</sup> is illusory.

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130. R.C.M. 1947, § 84-7505 (Supp. 1975).

131. R.C.M. 1947, § 84-7505(1) (Supp. 1975).

132. Defined in R.C.M. 1947, § 84-7504(17) (Supp. 1975).

133. R.C.M. 1947, § 84-7505(6) (Supp. 1975) specifies the following categories:

- (a) agricultural;
- (b) recreational;
- (c) residential;
- (d) commercial;
- (e) industrial; and
- (f) open space.

134. Defined in R.C.M. 1947, § 84-7504(9) (Supp. 1975).

135. R.C.M. 1947, § 84-7506 (Supp. 1975).

136. R.C.M. 1947, § 84-7507 (Supp. 1975).

137. *Id.*

138. R.C.M. 1947, § 84-7502 (Supp. 1975).

Assuming a local jurisdiction adopts a final classification of land, the governing body must manage such land so as to encourage continued usage in that classification. The governing body must approve any changes in classification which are then subject to review by the Department of Revenue. However, the Department may override the decision of the governing body only for cause.

A further attempt to induce beneficial land use decisions in rural areas is found in R.C.M. 1947, § 84-7510 (Supp. 1975). The owner of land which is outside the jurisdictional boundary of a city or town, and which is classified as either agricultural or recreational, may elect to subclassify such land. An agricultural landowner may subclassify under any of the four following categories:

- (1) Class A specifies land which the owner must keep in agricultural use, the subclassification of which may not be altered for twenty-five years. During such time the property taxes are reduced twenty percent;
- (2) Class B specifies land which the owner must keep in agricultural use with unaltered subclassification for ten years, during which time property taxes are reduced ten percent;
- (3) Class C specifies land which the owner may re-subclassify within the agricultural class at any time, with an attendant tax reduction of two percent. If the owner desires to change the subclassification to Class D he must first pay the difference between the taxes actually paid on the land during the previous ten years and the taxes which would have been paid but for the MELDA tax reduction;
- (4) Class D specifies land which may be reclassified into another category at any time, with an accompanying property tax increase of ten percent.<sup>139</sup>

If the owner of agricultural land fails to subclassify voluntarily within two years after his land is classified as agricultural, the Department of Revenue will automatically subclassify such land as Class D.<sup>140</sup>

The Act also provides that a recreational landowner may receive a tax reduction of twenty-five percent for permitting public outdoor recreation access for a minimum of ten years, and a reduction of forty percent if he further agrees to allow free public camping on such land in designated locations. In neither case, however, may the landowner change the use of such land to a purpose incompatible with the recreational use during the term of agreement.<sup>141</sup>

The residential land valuation for tax purposes is designed to

139. R.C.M. 1947, § 84-7510 (Supp. 1975).

140. R.C.M. 1947, § 84-7510(6) (Supp. 1975).

141. R.C.M. 1947, § 84-7511 (Supp. 1975).



discourage utilization of prime agricultural land for residential growth, and to encourage internal urban growth, rather than urban sprawl. If a residential land development significantly increases the overall population density of the surrounding area, the taxable value of the land will decrease.<sup>142</sup> If land classified as residential is used for another purpose, without the governing body's approval, its taxable valuation will be increased by forty percent.<sup>143</sup> Land unsuitable for agriculture which is used for residential purposes would have its taxable valuation decreased by five to twenty percent, depending upon its distance from a city or town, with the smallest reduction occurring for the greatest distance.<sup>144</sup> The taxable valuation of productive agricultural land used for residential development would be increased from two to twenty-five percent depending upon its distance from the city or town.<sup>145</sup> In addition to receiving tax reductions based upon location, if existing residential property is remodeled to increase its valuation, the homeowner will receive a tax reduction over a five year period.<sup>146</sup>

MELDA would offer substantial tax savings for certain types of commercial and industrial development. New commercial property, including both land and improvements, in a downtown area may not be taxed at all during the construction of the improvements. Strangely, there is no limit on the duration of the construction period,<sup>147</sup> nor does the Act's definition of "construction period" specify a point of termination: "'Construction period' means that period beginning with the issuance of a building permit, or in the case where building permits are not granted, the breaking of ground for construction purposes."<sup>148</sup> Following the completion of construction, the land and improvements are placed on the tax rolls under ten percent annual increments until one-hundred percent of the taxable valuation is reached.<sup>149</sup>

An added incentive to prevent the deterioration of buildings in the central business district is a provision by which the owners of commercial property pay increasingly higher taxes if they fail to remodel structures that are more than ten years old.<sup>150</sup> New commercial developments in suburban and rural areas may be taxed at an increase of up to twenty-five percent per year depending upon

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142. R.C.M. 1947, § 84-7512(1)(a) (Supp. 1975).

143. R.C.M. 1947, § 84-7512(1)(c) (Supp. 1975).

144. R.C.M. 1947, § 84-7512(2)(a)(ii) (Supp. 1975).

145. R.C.M. 1947, § 84-7512(2)(a)(iii) (Supp. 1975).

146. R.C.M. 1947, § 84-7512(1)(b) (Supp. 1975).

147. R.C.M. 1947, § 84-7513(4)(a) (Supp. 1975).

148. R.C.M. 1947, § 84-7504(14) (Supp. 1975).

149. R.C.M. 1947, § 84-7513(4)(b) (Supp. 1975).

150. R.C.M. 1947, § 84-7513(3) (Supp. 1975).

their distance from the central business district.<sup>151</sup> Another provision designed to encourage development inside the cities concerns the taxation of vacant lots held for speculation in a commercial area.<sup>152</sup> Such lots will be assessed, after a two year grace period, at an incrementally higher rate each year in order to encourage their sale. Such lots could be developed as parking areas or parks without penalty.

MELDA's tax treatment of industrial property is based on extremely complicated systems which apparently are designed to assess how well the industrial developer responds to social needs, such as roads, schools and housing, and the propriety of the location for industrial development. If an industrial development is located in an area classified as industrial, and if it will meet the socioeconomic needs of the area's residents, its property taxes may be reduced by fifty percent.<sup>153</sup> Conversely, a poorly planned industrial development which would be a tax burden to the community may suffer a tax penalty of twenty-five to one hundred percent, depending upon its location.<sup>154</sup>

MELDA attempts to provide for open spaces both in cities and in counties. If a piece of land is dedicated by the owner as "open space",<sup>155</sup> no property taxes are paid on it. An owner may change this open space classification only with approval of the local governing body, and upon payment of twice the amount of taxes that would have otherwise been assessed.<sup>156</sup> No owner may classify more than ten percent of his land as "open space" without the permission of the local governing body.

No section of the Act which has a "negative or adverse taxation effect" shall apply to a private residence owned by a person over sixty-two years of age, or to a person in an income bracket determined by the federal government to be below poverty standards.<sup>157</sup>

## 2. *Problems of MELDA*

An act as encompassing and complex as MELDA is bound to cause administrative headaches. MELDA is unique, however, in that its problems are more numerous and severe than usual.

Perhaps the most significant problem is the effect of the Act on the ability of local government to raise revenue to finance govern-

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151. R.C.M. 1947, § 84-7513(4)(b) (Supp. 1975).

152. R.C.M. 1947, § 84-7513(1) (Supp. 1975).

153. R.C.M. 1947, § 84-7516 (Supp. 1975).

154. R.C.M. 1947, § 84-7515 (Supp. 1975).

155. Defined in R.C.M. 1947, § 84-7504(7) (Supp. 1975).

156. R.C.M. 1947, § 84-7519(6) (Supp. 1975).

157. R.C.M. 1947, § 84-7522 (Supp. 1975).

ment services. Ideally, MELDA will decrease the need for public services because of its tax inducements for private planning to meet public needs. There is, however, no systematic attempt in the Act to insure that property tax revenues will be sufficient to meet local needs. There are both legal and practical constraints on the ability of the local units of government to raise revenue. Most cities, for instance, finance their needs through the use of an all-purpose annual mill levy. R.C.M. 1947, § 84-4701.2, establishes a sixty-five mill limit on the cities' use of the all-purpose annual levy. Most Montana cities cannot adequately fund city services within this limit. In all probability, MELDA will increase the need for city services, but decrease the ability of cities to raise revenue. An example is the provision that new commercial projects in downtown areas be exempted from property tax during the construction of improvements, with no limit on the "construction period."<sup>158</sup> Clearly, such new construction will increase the demand for city services. How are the cities to finance such services? MELDA fails to address this question.

A reasonably informed conclusion as to the effect of the Act on local revenue is impossible because of the complexities, the many contingencies, and the haphazard approach of the Act to the problem of revenue raising. The effect on the cities, however, will necessarily be severe. The entire thrust of the Act is to induce development in the central city and discourage "strip" development.<sup>159</sup> This is a laudable goal, but the tax advantages accompanying developments which locate in the central cities could significantly impair the ability of the cities to function adequately.

An additional problem is posed by the method of implementation contemplated by the Act. Implementation requires concerted action by such diverse and independent entities as local governing bodies,<sup>160</sup> Department of Community Affairs, Department of Revenue, as well as cooperative acts of private landowners. The bureaucratic complexity posed by requiring these entities to work in unison is not adequately dealt with in MELDA.

In addition to the bureaucratic complexity of MELDA, there is the administrative problem of the optional elections that individual landowners can make privately. R.C.M. 1947, §§ 84-7510 and 84-7511 allow agricultural and recreational landowners to "subclassify" their land. The subclassification can bestow various tax advantages on such private landowners depending on which subclassifications

158. R.C.M. 1947, § 84-7513(4) (Supp. 1975).

159. R.C.M. 1947, § 84-7503(2) (Supp. 1975).

160. Defined in R.C.M. 1947, § 84-7504(9) (Supp. 1975).

they elect.<sup>161</sup> These complex provisions threaten to be an administrative nightmare to local officials who must explain the Act to the public. Furthermore, the tax assessment function will be extremely difficult if a significant number of landowners elect to take advantage of any of the provisions.

The success of MELDA in protecting agricultural land, increasing urban densities, and providing open space will depend on the effectiveness of its tax incentives for land use. The Act's offer of up to twenty percent reduction of taxable value in exchange for keeping land in agricultural use for ten to twenty-five years, and penalties for the conversion of that same land, may theoretically be sound means of attaining specific goals. Practically, however, MELDA's plan of inhibiting the conversion of agricultural land by adjusting its appraised value suffers from a number of serious flaws. The major flaw is simply that tax penalties on conversion are too insignificant to discourage effectively speculation and development. As discussed previously, this same problem eviscerates the effectiveness of 1973 agricultural property tax amendments.

MELDA attempts to induce the remodeling of structures on commercial land by assessing tax penalties upon improved real property not remodeled within a ten-year period,<sup>162</sup> yet no attempt is made to exempt historic structures, or to recognize otherwise the state's cultural heritage. In this sense, the Act will duplicate many mistakes of federal urban renewal programs which eliminated much of the state's finest architecture in the name of urban progress.

MELDA seeks to induce better industrial planning by reducing taxes on well-planned industrial developments.<sup>163</sup> One criterion by which good planning is rewarded is a showing that an industrial facility "would not have significant adverse effects on the natural environment and would not cause undue air or water pollution."<sup>164</sup> Because the Act does not define "undue," such a determination presumably would be made on the basis of the type of facility involved. However, the term "undue" pollution, as well as many other parts of the same provision, is so vague that the decision of the local governing body to grant ultimate tax relief necessarily becomes largely subjective. A growth-ambitious board of county commissioners will delight in granting tax exemptions to attract new industry to their county regardless of the "significant adverse effects."

A major conceptual flaw in MELDA is its relation to existing zoning laws. One of the stated purposes of the Act is to reduce the

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161. See discussion *supra*, p.32.

162. R.C.M. 1947, § 84-7513 (Supp. 1975).

163. R.C.M. 1947, § 84-7516(1)(a)(ii) (Supp. 1975).

164. R.C.M. 1947, § 84-7516 (Supp. 1975).

need for zoning and other land control measures.<sup>165</sup> Yet without zoning, MELDA would allow virtually *any* land use anywhere, as long as the owner is willing, and financially able, to pay the tax penalty. Only landowners who cannot afford the price of noncompliance with an approved land use plan will manage their land accordingly.

There are other problems with MELDA too numerous to discuss adequately. It is questionable whether the Act can or should be salvaged. Tax law is complicated enough without further obscuring it with numerous land use complexities. Similarly, land use law is sufficiently complex without adding numerous tax consequences. Adequate police powers exist to enable the state to regulate land use directly. The Act purports to reduce the need for zoning and other land control measures by placing the state's "future development under a free market system controlled not by land regulation, but by economics."<sup>166</sup> Manipulation of tax rates to accomplish social goals is hardly a use of the "free market" system. Certainly direct regulation is a more efficient solution to land use problems in Montana. Direct regulation is less likely to result in needless complication and unforeseen problems.

MELDA's drawbacks outweigh any potential it may have for solving Montana's land use problems. Insofar as it purports to address Montana's land use problems, it diverts attention from real solutions. MELDA should be repealed in favor of a more direct approach to the land use problems in Montana.

### C. *Proposed Capital Gains Tax*

Another attempt at land use regulation through taxation occurred in the 1975 Montana Legislature with the introduction of a capital gains tax measure for short-term speculation on land sales.<sup>167</sup> The measure passed the House but was killed in the Senate. The measure was based on a recently enacted Vermont statute.<sup>168</sup> The Vermont statute places a steeply graduated capital gains tax on the resale of land within six years of its purchase. The tax rate is determined on two factors—the percentage of profit realized on the resale, and the number of years the land was held by the seller.<sup>169</sup> The bill introduced in the Montana Legislature generally followed the Vermont model. An amendment to the bill exempted "primary

165. R.C.M. 1947, § 84-7503 (Supp. 1975).

166. *Id.*

167. H.B. 374, 44th Legislature, 1975.

168. 32 VT. STAT. ANN. §§ 10001 through 10010 (Supp. 1976).

169. See *Vermont Acts to Check Land Speculators, Developers*, 3 ENV'T'L. L. REP. 10130 (1973).

homes," that is, homes used for the first domicile.

The problems which motivated the Vermont Legislature to enact the capital gains statute are similar to problems existing in Montana. Speculators are buying land in relatively undeveloped communities at higher prices than residents can afford and short-term speculation in land is hastening conversion of agricultural and open-space land to development areas.<sup>170</sup>

It seems obvious that this approach, if enacted, could have a substantial chilling effect on land speculation.

## V. REALTY TRANSFER ACT

In the last legislative session Montana's lawmakers enacted the Realty Transfer Act (RTA),<sup>171</sup> the stated purpose of which is to "obtain sales price data necessary to the determination of state wide levels and uniformity of real estate assessments by the most efficient, economical and reliable method."<sup>172</sup> The RTA is designed to provide the Montana Department of Revenue with information regarding the amount of valuable consideration paid for transfers of real property, thus giving the Department an additional, more precise indication of the property's true worth.

The RTA's definitions indicate the breadth of the Act: "transfer" includes any conveyance of title to real property;<sup>173</sup> "real estate" includes land, growing timber, structures and improvements affixed to land;<sup>174</sup> "value" is the "full actual consideration" paid, including the amount of any liens.<sup>175</sup> The RTA applies to transfers between and among individuals, partnerships, corporations, "or any other party."<sup>176</sup>

Under the RTA, parties to a real estate transaction are required to execute a certificate stating the consideration paid or to be paid for the property.<sup>177</sup> The county clerk and recorder may not record an instrument or deed evidencing a transfer of real estate without receipt of such certificate.<sup>178</sup> If a contract for deed is utilized, a similar certificate must be prepared.<sup>179</sup> The certificates are then transmit-

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170. Cf., *State Taxation—Use of Taxing Power to Achieve Environmental Goals: Vermont Taxes Gains Realized From Sale or Exchange of Land Held Less Than Six Years*, 49 WASH. L. REV. 1159 (1974).

171. R.C.M. 1947, §§ 84-7301 through 7311 (Supp. 1975).

172. R.C.M. 1947, § 84-7302 (Supp. 1975).

173. R.C.M. 1947, § 84-7303(1) (Supp. 1975).

174. R.C.M. 1947, § 84-7303(2)(a), (b), and (c) (Supp. 1975).

175. R.C.M. 1947, § 84-7303(3) (Supp. 1975).

176. R.C.M. 1947, § 84-7303(5) (Supp. 1975).

177. R.C.M. 1947, § 84-7305(1) (Supp. 1975).

178. R.C.M. 1947, § 84-7305(2) (Supp. 1975).

179. R.C.M. 1947, § 84-7305(4) (Supp. 1975).

ted by the clerk and recorder to the Department of Revenue.<sup>180</sup> All real property transfers not evidenced by a recorded document must be reported directly by the parties to the Department of Revenue.<sup>181</sup>

The RTA excepts several types of transfers from the certificate requirements. The notable exceptions include sales of agricultural land when the land is used for agricultural purposes;<sup>182</sup> transfers between spouses, or between parent and child when only nominal actual consideration was paid;<sup>183</sup> transfers of decedents' estates;<sup>184</sup> transfers of a gift;<sup>185</sup> transfers in contemplation of death;<sup>186</sup> and instruments recorded prior to the effective date of the Act, May 1, 1975.<sup>187</sup>

The RTA contains a number of safeguards to protect individual interests. The provision declaring the information disclosed on the certificates to be confidential and not a matter of public record illustrates legislative intent to safeguard individual privacy.<sup>188</sup> Similarly, although the clerk and recorder may not record an instrument which transfers real estate until receipt of the certificate, the validity of such instrument as between the parties is not adversely affected.<sup>189</sup> The failure to execute a certificate does, however, extend the time period during which the transferor's creditors can secure liens against the property.

The sale price of real estate is not the sole determinant of assessed value. For example, if the consideration is to be paid in deferred installments of ten or more years, the Department shall consider the terms of the contract, amount of down payment, amount of each installment, rate of interest, and other covenants or exceptional circumstances which may affect the consideration paid for real estate.<sup>190</sup>

The RTA imposes a criminal misdemeanor penalty for any person "convicted of violating any provision of this act. . . ."<sup>191</sup> This language is presumably broad enough to apply to public officials who violate the confidentiality mandate of R.C.M. 1947, § 84-7308, as well as to parties who fail to execute the required certificate, or who provide false information.

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180. R.C.M. 1947, § 84-7305(5) (Supp. 1975).

181. R.C.M. 1947, § 84-7304(1) (Supp. 1975).

182. R.C.M. 1947, § 84-7307(2) (Supp. 1975).

183. R.C.M. 1947, § 84-7307(10) (Supp. 1975).

184. R.C.M. 1947, § 84-7307(8) (Supp. 1975).

185. R.C.M. 1947, § 84-7307(9) (Supp. 1975).

186. R.C.M. 1947, § 84-7307(13) (Supp. 1975).

187. R.C.M. 1947, § 84-7307(1) (Supp. 1975).

188. R.C.M. 1947, § 84-7308 (Supp. 1975).

189. R.C.M. 1947, § 84-7305(2) (Supp. 1975).

190. R.C.M. 1947, § 84-7309(2) (Supp. 1975).

191. R.C.M. 1947, § 84-7310 (Supp. 1975).

Several portions of the RTA require clarification and strengthening. For example, the penalty provision does not specify to whom it applies. The phrasing and punctuation of R.C.M. 1947, § 84-7307(10) also poses a construction dilemma:

The certificate imposed by this act shall not apply:

.....

(10) to a transfer between husband and wife, or parent and child with only nominal actual consideration therefor;

Is the legislative intent to exclude all husband and wife transfers, or husband and wife transfers in which there is only nominal consideration? Similarly, the exclusion of agricultural land "when the land is used for agricultural purposes"<sup>192</sup> is, as presently drafted, too broad. If only a small portion of the transferred land is agricultural, the transfer still qualifies for the exclusion. To maximize the effectiveness of the RTA, the agricultural exclusion should apply only to transfers in which fifty percent or more of the land will be used for agricultural purposes. A definition of "agricultural" for the purposes of this Act should be added to R.C.M. 1947, § 84-7402. The definition of "partial interest"<sup>193</sup> should either be omitted from the RTA (the term is not presently found elsewhere in the Act), or should be clarified.

These problems are seemingly minor compared to the overall effectiveness of the RTA. It should indeed accomplish the heretofore elusive objective of uniform real estate assessment.

## VI. ANNEXATION LAW

Many cities across the country have recently evinced a new attitude toward growth. Realizing that growth engenders sprawl, congestion, rising crime, higher taxes, and generally a lower quality of life, many cities have attempted to close their doors to new residents. Cities have experimented with various devices to slow growth.

In 1971, the electors of the City of Boulder, Colorado, voted on two referenda concerning the question of growth. The first measure would have required the City to limit and stabilize the population growth at approximately 1,000 persons. It was defeated. The second measure, which passed, directed the City to analyze the population and growth rate of the Boulder Valley. Pending completion of such study, the City, in cooperation with the County, was directed to hold the growth rate in the Boulder Valley at a level substantially

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192. R.C.M. 1948, § 84-7307(2) (Supp. 1975).

193. R.C.M. 1947, § 84-7303(4) (Supp. 1975).



below the phenomenally high level experienced in the 1960's. As part of the effort to control growth, the City developed a virtual monopoly on the water supply and sewer services of areas of the Valley outside the City limits and then restricted access to such services.<sup>194</sup> A Colorado District Court rejected this method of minimizing growth, holding that the City may not "discriminate between prospective users of water and sewer services in the . . . area where it has established an area of service and has become the exclusive supplier of services in that area."<sup>195</sup>

The City of Ramapo, New York developed a more successful growth control method which was sustained in the landmark case, *Golden v. Planning Board of Ramapo*.<sup>196</sup> Ramapo adopted two plans covering a period of eighteen years, and adopted a zoning ordinance to eliminate premature subdivision and urban sprawl. Residential development was to proceed in conjunction with the development of adequate municipal facilities. A complicated system of development points was established to insure that growth was preceded by adequate extension of services such as roads, schools, firehouses, parks and sanitary sewers. The ordinances effectively slowed the pace of growth. The New York Court sustained Ramapo's scheme holding that "phased growth is well within the ambit of existing enabling legislation,"<sup>197</sup> and holding the policies not to be an unconstitutional "taking" of land, largely because the ordinances were temporary rather than permanent.<sup>198</sup>

The City of Petaluma, California, in the San Francisco Bay metropolitan region, also made a notable attempt to slow the pace of growth. Petaluma adopted a growth policy with the following preamble: "In order to protect its small town character and surrounding open spaces, it shall be the policy of the City to control its future rate and distribution of growth. . . ."<sup>199</sup>

The "Petaluma Plan," adopted in 1971, was elaborate, but ex-

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194. See "Robinson v. Boulder: Utilities and Growth Control Challenges," II URBAN LAW INSTITUTE, MANAGEMENT AND CONTROL OF GROWTH, 237 (1975).

195. Robinson v. City of Boulder, State District Court, Colorado, No. 72-2033-1 (May 20, 1974).

196. 30 N.Y.2d 359, 288 N.E.2d 291, *appeal dismissed*, 409 U.S. 1003 (1972); see generally "The Approval of Ramapo, New York," in ch. 8 of MANAGEMENT AND CONTROL OF GROWTH, *supra* note 194.

197. *Golden v. Planning Bd.*, 30 N.Y.2d 369, 288 N.E.2d 291, 300 (1972).

198. *Id.* at 303-04. The meaning of the term "temporary" in the context of the court's opinion, however, was not a very short period of time. The court stated:

"Without doubt restrictions upon the property in the present case are substantial in nature and duration [extending for a maximum period of eighteen years.] They are not, however, absolute." 285 N.E.2d at 304.

199. *Construction Industry v. City of Petaluma*, 375 F. Supp. 574, 576 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (District court's finding of fact No. 7).

tensive discussion of the plan is not warranted. One of the simple features of the plan, however, was the limitation of new housing units to "approximately one-third to one-half of the demographic and market demand of the 1970-1971 period."<sup>200</sup> When the plan was challenged, a federal district court found the plan to be an unconstitutional infringement on the freedom to travel.<sup>201</sup> The Ninth Circuit reversed,<sup>202</sup> holding that the landowners and builders who challenged the plan lacked standing to raise the constitutional issue of right to travel. The court found that such plaintiffs did have standing to raise constitutional questions relating to substantive due process and the commerce clause. The court, however, rejected these arguments on the merits, holding that the Petaluma Plan would in fact bring more low and moderate income persons into the community, and that the Plan was rationally related to the social and environmental welfare of the community.<sup>203</sup>

Most attempts to limit growth have occurred in areas which are highly attractive because of substantial environmental and social amenities. A number of Montana cities are experiencing inordinately high growth rates. Congestion and haphazard sprawl have accompanied these population increases. It is only a matter of time before some of these cities follow the lead of cities in other regions which have sought to limit growth.

In the past, Montana cities have exerted little control over growth outside the city limits. Recently, however, the Montana Department of Health and Environmental Sciences has established more restrictive regulations for subdivisions serviced by individual wells and septic systems. For instance, regulations of that Department provide for a minimum lot size of one acre where individual water and sewage disposal systems are utilized.<sup>204</sup> Annexation procedures will be more important as Montana cities grow, because such procedures will not allow expansion unless adequate utility services are provided. Attention will increasingly focus on Montana laws dealing with extension of city services and annexation. The most significant statute in this area is the Planned Community Development Act of 1973 (PCDA).<sup>205</sup> The PCDA purports to do three things: (1) establish prerequisites and procedures for the annexation of contiguous areas by municipalities, including the authorization of freeholder petitions for annexation; (2) require municipalities to plan

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200. *Id.* (Finding of fact No. 9(a)).

201. *Id.* at 581.

202. *Construction Industry v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

203. *Id.* at 909.

204. MAC § 16-2.14(10)-S14340(3)(a).

205. R.C.M. 1947, §§ 11-514 through 11-525 (Supp. 1975), enacted in 1974 [hereinafter referred to as PCDA].

the extension of governmental services to such areas; and (3) provide for judicial review of annexation proceedings.<sup>206</sup>

In its stated purpose, the PCDA recognizes the inequities in Montana's existing annexation laws:

It is declared as a matter of state policy that current annexation laws and planning methods incorporated in the Montana system are . . . discriminatory and are causing . . . indiscriminate growth patterns and forcing . . . citizens of municipalities to be annexed without provision for adequate city services extended and provided for them. Likewise, in many cities city government is annexing and adding to cities not to the benefit of those being annexed, but to the benefit of the city, merely to derive a greater tax base. Likewise, in many cities there are those lying on the perimeter of the city not within the corporate boundaries of a city that are deriving many benefits from the city without paying their just and equal share for these services. Therefore, it is the purpose of this act to develop a just and equitable system of adding to and increasing cities boundaries for the state of Montana. . . .<sup>207</sup>

Under the PCDA several standards must be met before annexation can be considered. The total area annexed must be contiguous to the municipality's boundaries; no part of the area shall be included within the boundary of another incorporated municipality; the area must be included within, and the proposed annexation must conform to, a comprehensive plan; and no part of the area can be within any fire district which has existed for over ten years prior to the inception of annexation.<sup>208</sup> If the proposed annexation area conforms to these standards, annexation procedures may be initiated. The first step is the passage by the governing body of any municipality of a "resolution stating the intent of the municipality to consider annexation."<sup>209</sup> Such resolution shall describe the boundaries of the area under consideration and fix a date for the public hearing on the issue of annexation.<sup>210</sup> The governing body may pass this resolution upon its own initiative, or upon the petition of fifty-one percent of the resident freeholders in the territory sought to be annexed.<sup>211</sup>

The PCDA states that if the municipal governing body fails to act within sixty days of receiving such a petition, "the petitioners [freeholders] may appeal to the district court under the procedure

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206. Laws of Montana (1974), ch. 364, Title of Act.

207. R.C.M. 1947, § 11-515 (Supp. 1975).

208. R.C.M. 1949, § 11-519 (Supp. 1975). "Contiguous" is defined in R.C.M. 1947, § 11-516(1) (Supp. 1975).

209. R.C.M. 1947, § 11-520 (Supp. 1975).

210. *Id.*

211. R.C.M. 1947, § 11-517 (Supp. 1975).

set down in [R.C.M. 1947, § 11-522] of this act.”<sup>212</sup> In fact, the appeal remedy available to freeholders is in R.C.M. 1947, § 11-523. Under that statute, freeholders are required to file a complaint stating the reason why the proposed annexation should take place. If the freeholders prevail, the court is required to order the annexation. No further proceedings under the Act are necessary, and annexation of the territory is deemed complete. If, however, the evidence does not establish all three of the factors set forth in the statute,<sup>213</sup> the court shall deny the petition to annex and dismiss the proceeding. The only remaining remedy for the freeholders is to begin anew by circulating a second petition.

If the governing body does pass a resolution stating the intent to consider annexation, the next procedure required by the PCDA is a public hearing. The public hearing is to be held not less than thirty nor more than sixty days following passage of the resolution.<sup>214</sup> Notice of the hearing must be published and such notice shall, among other things, inform the public of the availability of a report setting forth plans to provide services to the proposed annexation.<sup>215</sup>

The requirement for such a report is one of the major changes in Montana annexation law. R.C.M. 1947, § 11-518 (Supp. 1975) details the required contents, including maps of current street, sewer and other utility patterns as well as the proposed extensions of such services, identification of the municipality's long-range plans for the extension of major services, and a description of the methods by which the municipality will finance such extension. If any “capital improvements” are proposed, plans in the report must allow the resident freeholders in the annexation area to vote upon such improvements. PCDA does not clearly define the “capital improvements,” but by implication they include water and sewage services, streets, curbs and gutters.<sup>216</sup> Even if no capital improvements are necessary, the plan must provide for extension of police and fire protection, garbage collection and street maintenance. If the report clearly states that the entire municipality will share the tax burden for these services, the area may be annexed under the provisions of the Act, without a bond issue. The governing body must approve the report and make it available to the public prior to the public hearing.<sup>217</sup>

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212. *Id.*

213. R.C.M. 1947, § 11-523 (Supp. 1975).

214. R.C.M. 1947, § 11-520(1) (Supp. 1975).

215. R.C.M. 1947, § 11-520(2) (Supp. 1975).

216. R.C.M. 1947, § 11-518(3)(e) (Supp. 1975).

217. R.C.M. 1947, § 11-520(3) (Supp. 1975).

Following the public hearing, at which all residents of both the annexation area and the municipality must be given an opportunity to be heard,<sup>218</sup> the municipal governing body shall consider the facts presented at the hearing and shall have authority to amend the previously mentioned report and to alter the plans for serving the annexation area, so long as the alterations comply with R.C.M. 1947, § 11-518.<sup>219</sup> If a majority of the resident freeholders express written disapproval of the proposed annexation within twenty days after the hearing, no further proceedings may be undertaken for one year.<sup>220</sup>

The next procedure is adoption of the annexation ordinance. The municipal governing body has the authority to adopt such an ordinance at any regular or special meeting held no sooner than seven, nor later than sixty days following the public hearing.<sup>221</sup> The ordinance must contain specific findings that the area to be annexed meets the standards of contiguity, location in an unincorporated area, inclusion within the city-county comprehensive plan, and location outside certain fire districts. The ordinance must state the intent of the municipality to provide services to the area being annexed, and must fix the effective date of annexation, which may be any date within twelve months from the date of the ordinance's passage. Upon the effective date of the ordinance, the annexed area and its citizens are subject to all debts and regulations of the municipality, including obligation for municipal taxes levied for the fiscal year following the effective date.

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218. R.C.M. 1947, § 11-520(4) (Supp. 1975).

219. R.C.M. 1947, § 11-520(5) (Supp. 1975).

220. R.C.M. 1947, § 11-520(8) (Supp. 1975). This provision creates two substantial problems, neither of which is effectively resolved by the present Act. The first concerns the twenty day period during which the resident freeholders may express their written approval or disapproval of the proposed annexation. The reader will recall that the municipal governing body is empowered to adopt the annexation ordinance at any time between seven to sixty days following the public hearing. Under PCDA, the ordinance could be adopted, and annexation could become effective prior to the expiration of the twenty day comment period. Suppose on the twentieth day, the written expressions are tabulated and evince majority disapproval. Has the municipal governing body, through its hasty but entirely legal action, successfully circumvented the disapproval process? Or has the disapproval abrogated annexation? Such a discrepancy could easily be rectified by precluding the governing body from action upon the zoning ordinance until the twenty day period has elapsed. In this way, if a majority of the resident freeholders oppose annexation, and properly express such opposition, the governing body is estopped from taking further action relative to annexation for one year.

The second problem concerns what action the governing body is required to take in one year following majority disapproval. May the governing body simply wait a year, convene, and adopt the annexation ordinance, or must they begin the process anew? If the former, what is the rationale for waiting a year? Surely that only defers the inevitable—a court challenge or consummation of annexation. However, if the PCDA's intent is to have the governing body begin anew, such intent is anything but clear.

221. R.C.M. 1947, § 11-520(5) (Supp. 1975).

The PCDA makes special provision for court review of annexations.<sup>222</sup> Such special provision may be in response to *Penland v. City of Missoula*,<sup>223</sup> which interpreted previous annexation law as excluding court review. *Penland* held that residents of a proposed annexation area must register their opposition through the statutory approval/disapproval process, and could not do so in courts of law. Under the new Act, a petition for court review must be filed within thirty days of the passage of an annexation ordinance.<sup>224</sup> The ground upon which the petitioners may challenge the annexation is belief that they will suffer material injury because 1) the municipal governing body failed to comply with the PCDA's procedures, or 2) the requirements of R.C.M. 1947, § 11-519, as they apply to "his or their property" were not met.<sup>225</sup>

Those who have standing to petition for court review include either a majority of the resident freeholders in the annexation territory, or the owners of more than seventy-five percent of the assessed valuation of real estate in the territory.<sup>226</sup> This latter provision nullifies the Montana Supreme Court's decision in *Burritt v. City of Butte*,<sup>227</sup> which determined that a *non*-resident freeholder in an annexed area may be constitutionally excluded from those persons permitted to protest the annexation.<sup>228</sup> Under the PCDA, non-resident freeholders such as motel owners, retail shopping center merchants, grocers, veterinarians, and other similarly situated individuals are still precluded from effective protest<sup>229</sup> prior to annexation, but they now have standing to challenge the legality of the annexation in court. In this regard, the legislature has successfully struck a balance. The non-residents with substantial real estate investments may challenge the annexation for cause, but they may not prevent the annexation if the majority of the resident freeholders desire annexation.

The court may find that: 1) statutory procedure was not followed; 2) the report to provide services (R.C.M. 1947, § 11-515) was inadequate; 3) the boundary standards of R.C.M. 1947, § 11-519 were not met; or 4) all procedures were proper.<sup>230</sup> The court may respectively: 1) remand the ordinance to the governing body to correct procedural irregularities; 2) remand the report for amendment

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222. R.C.M. 1947, § 11-522 (Supp. 1975).

223. 132 Mont. 591, 318 P.2d 1089, 1092 (1957).

224. R.C.M. 1947, § 11-522(1) (Supp. 1975).

225. *Id.*

226. *Id.*

227. 161 Mont. 530, 508 P.2d 563 (1973).

228. *Id.* at 567.

229. R.C.M. 1947, § 11-520(8) (Supp. 1975), refers solely to "resident freeholders".

230. R.C.M. 1947, § 11-522(3)(a)-(c) (Supp. 1975).

of the plan to provide services; 3) remand the ordinance for amendment of the boundary standards; or 4) may affirm the action of the governing body without change.<sup>231</sup> The right of court review to compel the governing body to act upon annexation is discussed above.<sup>232</sup>

In 1975, the PCDA withstood its first, and as of this writing, its only court challenge. In *Missoula Rural Fire District v. City of Missoula*,<sup>233</sup> the City of Missoula sought to annex certain lands which were wholly surrounded by the city limits. The areas sought to be annexed were also contained within the boundaries of the Missoula Rural Fire District. An older annexation law,<sup>234</sup> provides a summary annexation procedure specifically pertaining to annexation of land that is wholly surrounded by a city. The PCDA, in effect at the time, does not contain such a specific summary procedure for land encircled by city limits. The City contended that it should thus be allowed to proceed under the earlier annexation law. It grounded this contention upon the following provision of the PCDA: "The method of annexation authorized by this act shall be construed as supplemental to and independent from other methods of annexation authorized by state law."<sup>235</sup>

The Supreme Court of Montana recognized the dangers of permitting a city to choose the most convenient annexation procedure and to ignore the PCDA. The court declared:

If a city can annex an area using existing annexation procedures which are not inconsistent with the 1973 Act [PCDA], it may continue to do so. But the city must follow the procedures of the 1973 Act in all other instances, or the 1973 Act will be a meaningless and a useless action of the legislature.<sup>236</sup>

Thus, the court determined that "by drawing no distinction between the annexation of wholly surrounded and adjacent areas, the legislature is presumed to have intended the 1973 Act should pertain to all types of annexation covered by the existing statutes."<sup>237</sup> The court correctly determined that the PCDA requirement of a detailed plan for services, notice, public hearing and ascertainment of disapproval prior to annexation is clearly inconsistent with summary annexation.

Because of the problems of urban expansion and because of the

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231. R.C.M. 1947, § 11-522(3)(c)(i) through (iii) (Supp. 1975).

232. R.C.M. 1947, § 11-522(4) (Supp. 1975).

233. —Mont. —, 540 P.2d 958 (1975).

234. R.C.M. 1947, § 11-403(1) (Supp. 1975).

235. R.C.M. 1947, § 11-525 (Supp. 1975).

236. *Missoula Rural Fire Dist. v. City of Missoula*, — Mont. —, 540 P.2d 958-61 (1975).

237. *Id.* at 960.

economic consequences of annexation, the PCDA is likely to be a fruitful source of litigation. There are three possible scenarios which might arise: (1) a city wishes to annex a territory but some of the affected landowners resist; (2) a majority of the affected landowners desire annexation but the city resists; (3) a majority of the affected landowners desire annexation but city residents (particularly business persons fearing competition) resist.

The first situation is clearly covered by R.C.M. 1947, § 11-522. Either a majority of resident freeholders in the territory or owners of more than seventy-five percent of the assessed valuation of real estate in the territory have standing to invoke a limited judicial review of a city's decision to annex. The second situation is likely to occur as cities develop no-growth attitudes and resist growth by restricting extension of city services. In this situation, the procedure available to the landowners is also clear. R.C.M. 1947, § 11-523 provides that the landowners may invoke judicial review to compel annexation. The effectiveness of this remedy, however, is not clear. Freeholders in the area may file a complaint stating why the proposed annexation should take place.<sup>238</sup> At a non-jury hearing, in which the municipality appears as party defendant, the freeholders must establish three factors.<sup>239</sup> If the freeholders establish these factors the court must order the annexation to take place.<sup>240</sup> However, the determination of a city's ability to provide the requested services is highly subjective. Freeholders seeking to compel annexation through judicial review may have difficulty establishing such ability if the city strenuously resists extension of its services.

The third scenario, the case of municipal residents opposing the annexation, presents the most perplexing problems. The typical situation involves the proposed creation of a large shopping center on the outskirts of the municipality. The shopping center cannot proceed without utility services. The city may be willing to extend such services and the landowners in the area may be amenable to annexation. Downtown business people, however, resist the annexation because of the adverse economic impact on the downtown shopping area. Whether these municipal residents have standing, and whether procedures are available for them to question the validity of the annexation proposal are not easily answered. It is clear that PCDA does not contain any provision relating to such challenges.

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238. R.C.M. 1947, § 11-522 (Supp. 1975).

239. R.C.M. 1947, § 11-523 (Supp. 1975), provides the freeholders must establish that: 1) essential municipal services are not currently available to the inhabitants of the territory sought to be annexed; 2) the municipality is physically and financially able to provide such services to that territory; and 3) at least one-eighth of the aggregate external boundaries of that territory is contiguous to the municipality's boundaries.

240. R.C.M. 1947, § 11-523(3) (Supp. 1975).



There are cases in Montana in which city residents and taxpayers challenged expenditure of city funds for illegal purposes,<sup>241</sup> but it is doubtful such challenges could be utilized in an annexation context. An alternative remedy might be an action under the Uniform Declaratory Judgment Act,<sup>242</sup> which appears liberal in its standing requirements for persons seeking a declaratory judgment on certain issues.<sup>243</sup>

Montana cities are faced with increasing growth rates for a number of reasons. Whether they will attempt to follow the footsteps of cities in other regions which have sought to limit growth by restricting essential services, by zoning, and by manipulation of building permits is an unanswered question. The role of the Planned Community Development Act in controlling urban growth also remains to be seen.

## VII. ZONING LITIGATION

As local governments have increased efforts to improve land use by the traditional method of zoning, the inevitable conflicts between affected landowners and governmental units have increased.

### A. *United States Supreme Court Cases*

In 1974, the United States Supreme Court handed down the highly significant zoning decision, *Village of Belle Terre v. Boraas*.<sup>244</sup> In *Boraas* the court rejected a constitutional attack on a village zoning ordinance restricting land use to one-family dwellings.<sup>245</sup> The ordinance was challenged by six college students who rented a house in the village. The lower court ruled in favor of the tenants, finding the ordinance violative of the equal protection clause of the fourteenth amendment of the United States Constitution. The lower court did not apply the "strict scrutiny" test; it applied a variation of the "rational relationship" test "with bite."<sup>246</sup> The Supreme Court, in an opinion by Justice Douglas, reversed, finding the strict scrutiny test inapplicable and rejecting the argument of the tenants that privacy and associational rights were involved. The majority found that the ordinance represented "economic and social legisla-

241. See, e.g., *Greener v. City of Great Falls*, 157 Mont. 376, 485 P.2d 932 (1971), where the supreme court apparently assumed standing was available to such parties. See also *Hames v. City of Polson*, 123 Mont. 469, 215 P.2d 950 (1950).

242. R.C.M. 1947, §§ 93-8901 through 8916 (Supp. 1975).

243. R.C.M. 1947, § 93-8902 (Supp. 1975).

244. 416 U.S. 1 (1974).

245. The definition of "family" was limited to the traditional, related family, and to groups of not more than two unrelated persons.

246. GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW*, 871, at n. 1. (9th ed. 1975).

tion"<sup>247</sup> and invoked an extremely deferential standard of review.

The significance of the *Boraas* decision is that it establishes the backdrop to constitutional challenges of the zoning power by units of local government. The lesson of *Boraas* is that local governments have extremely wide constitutional latitude in dealing with local environmental and social problems. Only if there appears to be a palpably arbitrary extension of the police power in zoning legislation will the Federal Constitution intervene. Justice Douglas stated in the majority opinion:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.<sup>248</sup>

Although future cases will present facts which the court might treat differently, it is clear that local units of government under the authority of *Boraas* have enough constitutional flexibility to respond imaginatively to land use problems.

Another case decided by the Supreme Court in 1975, *Warth v. Seldin*,<sup>249</sup> greatly restricted the ability of litigants to challenge municipal zoning ordinances. The Court, emphasizing that standing to invoke federal jurisdiction involves both constitutional limitations under Article III's case or controversy requirement and prudential limitations relating to "judicial self-governance," held that four distinct groups of plaintiffs lacked standing to attack an exclusionary zoning law.<sup>250</sup> The precise implications of that ruling are not yet clear, but it appears that the decision constitutes a significant retrenchment in the field of zoning litigation from the general trend of more liberalized standing requirements in other fields, particularly environmental law.<sup>251</sup> The Court in *Warth* seemed to require a demonstrated causal link between the nonresidents' exclusion and the defendants' zoning practices.<sup>252</sup> If followed, that decision will make challenging local zoning regulations on constitutional grounds even more difficult.

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247. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

248. *Id.* at 9.

249. *Warth v. Seldin*, 422 U.S. 490 (1975).

250. See *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 189 (1975).

251. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

252. *The Supreme Court, 1974 Term*, *supra* note 242, at 190.

### B. *Temporary Interim Zoning in Montana*

There have been no significant *constitutional* challenges to Montana zoning statutes or ordinances in recent years.<sup>253</sup> The significant recent cases in Montana involve statutory construction, and the application of common law principles such as estoppel.

A statute enacted by the 1971 legislature authorizes counties to adopt, as an emergency measure, a temporary interim zoning map or regulation.<sup>254</sup> This section provides counties the means to control development prior to the actual adoption of a zoning map or plan pursuant to the other provisions of county zoning law, and applies to any county which:

[I]s conducting, or in good faith intends to conduct studies within a reasonable time, or has held or is holding a hearing for the purpose of considering a master plan or zoning regulations or an amendment, extension, or addition to either pursuant to this chapter.<sup>255</sup>

Any such interim resolution is limited to one year, although the board of county commissioners may extend the resolution an additional year.<sup>256</sup>

In *Bryant Development Association v. Dagle*,<sup>257</sup> the Montana Supreme Court held that a temporary zoning resolution adopted pursuant to this statute was void for failure to follow notice and hearing provisions set forth in a different section of the same chapter dealing with adoption of permanent zoning ordinances.<sup>258</sup> *Bryant* involved the owner of an antique auto storage and repair shop in Lewis and Clark County who decided to construct a new commercial steel building on land adjacent to his facility. Relying upon representations of appropriate county officials that no zoning or building restrictions were contemplated for the neighborhood before January 1974, the owner purchased the adjacent property in July, 1973. On September 10, 1973, the owner entered into negotiation with a building contractor for construction of the prefabricated building to be assembled on the job site; although a formal contract was not signed until September 17, 1973, the manufacturer confirmed a purchase order on September 14, and the contractor began construc-

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253. *Bryant Development Assn. v. Dagle*, 166 Mont. 252, 531 P.2d 1320 (1975), partially involved a due process challenge to the application of Montana's interim zoning statute (R.C.M. 1947, § 16-4711); however, the case essentially involved matters of statutory construction.

254. R.C.M. 1947, § 16-4711 (Supp. 1975).

255. *Id.*

256. *Id.*

257. 166 Mont. 252, 531 P.2d 1320 (1975).

258. R.C.M. 1947, § 16-4705 (Supp. 1975).

tion. In the meantime, on September 13, 1973, unbeknown to the owner of the auto shop, and without prior notice, the Lewis and Clark County Commissioners held an emergency session at which they adopted a temporary interim zoning resolution restricting further development of the area to residential single family dwelling units. The Commissioners convened the meeting at the request of the Development Association's members who resided in the neighborhood of the proposed addition to the auto shop with the express purpose of preventing completion of the building project. One week after this meeting the contractor was notified that the building project had thus been prohibited. Approximately two weeks later, the owner of the auto facility filed an application for a variance or in the alternative an appeal from the decision of the County Commissioners with the Lewis and Clark County Board of Adjustment. The auto shop owner also contended he was entitled to a nonconforming use exception to the zoning.

The Board of Adjustment granted the requested variance. The Development Association requested district court review of the grant of the variance by petition for writ of certiorari. The district court sustained the order granting the variance, finding the order to be based on substantial evidence. The district court did not reach the cross-claim of the auto shop owner who claimed entitlement to a nonconforming use exception. The district court dismissed the claim of the shop owner that the zoning ordinance was unconstitutional.

On appeal, the Montana Supreme Court brushed aside the central issue of the case—whether the Board of Adjustment based the grant of a variance on substantial evidence<sup>259</sup>—and proceeded to consider whether the interim zoning statute was unconstitutional because of its failure to afford notice and hearing prior to enactment of an emergency interim zoning ordinance. The appellant's opening brief did not raise this issue and the reply brief of appellee<sup>260</sup> mentioned it only in passing. The court, however, after raising the issue declined to resolve it.<sup>261</sup> Instead, although recognizing the statute<sup>262</sup> had no explicit notice or hearing provisions, the court engrafted certain notice and hearing procedures contained in a different statute<sup>263</sup> dealing with enactment of permanent zoning ordinances. The logic of this judicial legislation is convoluted. Justice Castles reasoned:

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259. Bryant Development Assn. v. Dagel, 166 Mont. 252, 531 P.2d 1320, 1323 (1975).

260. See briefs of appellant and appellee, on file in the State Law Library, State Capitol, Helena.

261. Bryant Development Assn. v. Dagel, 166 Mont. 252, 531 P.2d 1320, 1324 (1975).

262. R.C.M. 1947, § 16-4711 (Supp. 1975).

263. R.C.M. 1947, § 16-4705 (Supp. 1975).

In viewing Chapter 47, Title 16, R.C.M. 1947, as a whole, it is clear that section 16-4711, providing for the enactment of emergency zoning regulations, is governed by the provisions of section 16-4705, providing for notice and hearing 'in the adoption or amendment of zoning regulations.' Nothing in Chapter 47, nor in section 16-4711 in particular, detracts from this view. In fact, when section 16-4711 was enacted the immediately preceding section of that bill was an amendment of section 16-4705. The close proximity of these two sections in Chapter 273, Laws of 1971, would indicate a legislative intent that these two sections should be construed together.<sup>264</sup>

Stated another way, the court in *Bryant* developed a new rule of statutory construction—that those sections of legislative enactments in "physical proximity" should be construed together. If followed, this unique rule would lead to absurd results. Although it is permissible, to resolve a question of statutory interpretation so as to avoid a constitutional problem, there are limits to the elasticity of this reasoning process. In *Bryant* the court need not have reached the constitutional issue; the central issue, and simpler one, was the validity of the variance. Although the parties tangentially raised the due process issue, neither party argued that the notice and hearing provisions of R.C.M. 1947, § 16-4705, applied to R.C.M. 1947, § 16-4711.<sup>265</sup>

A more critical flaw in *Bryant*, however, is the failure of the court to consider the policies underlying the interim zoning statute and the countervailing policies for affording landowners prior notice and hearing. The purpose of emergency interim zoning regulation is to preserve the land in status quo pending the time-consuming process of developing permanent zoning ordinances.<sup>266</sup> The purpose of providing prior notice and hearing on the other hand, is to afford basic fairness to the affected landowner—to provide an opportunity to be heard and thus to protest prior to any decision-making. These two goals, preserving the status quo and affording fundamental fair-

264. *Bryant Development Assn. v. Dagel*, 166 Mont. 252, 531 P.2d 1320, 1324 (1975).

265. Indeed, if the issue had been fully briefed, i.e., whether the notice and hearing requirements for enactment of permanent zoning ordinances (R.C.M. 1947, § 16-4705 (Supp. 1975)) applies to the interim zoning ordinance statute (R.C.M. 1947, § 16-4711 (Supp. 1975)), the court's statutory interpretation might well have been different. The general statement of legislative purpose preceding the *permanent* zoning ordinance statute (R.C.M. 1947, § 16-4705 (Supp. 1975)), makes it clear that the chapter applies to those local governments "whose governing bodies have adopted a comprehensive plan." R.C.M. 1947, § 11-4701 (Supp. 1975). On the other hand, R.C.M. 1947, § 16-4711 (Supp. 1975) dealing with interim zoning ordinances, applies to those counties which, *inter alia*, have held or are holding a hearing "for the purpose of considering a master plan." This issue was later raised by the appellees in *State ex rel. Spring v. Miller*, — Mont. —, 545 P.2d 660 (1976), but was rejected by the court. See brief of appellees in *Spring* on file in State Law Library, State Capitol, Helena.

266. See *Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963).

ness to the landowner, conflict. Several California courts have resolved this conflict in favor of preserving the status quo at the expense of depriving landowners of notice and hearing. In *Metro Realty v. County of El Dorado*,<sup>267</sup> the court stated:

The reason no notice is required is that the ordinance is, as its name states, an 'urgency' measure, the very purpose of which to preserve the status quo would be destroyed if notice and hearing were required. When the permanent plan and a zoning ordinance thereunder is before the county for adoption, notice and a hearing will be required as an essential part of procedural due process.

The Montana Supreme Court considered these policy questions in a second case, *State ex rel. Spring v. Miller*,<sup>268</sup> involving the enactment of an interim zoning ordinance in Powell County. In that case Powell County, which admitted it had not provided notice or hearing before enacting its interim zoning ordinance, requested that the court overrule its holding in *Bryant*. The county argued that preserving the status quo under circumstances sufficiently urgent to warrant emergency resolutions takes priority over due process requirements until consideration of a permanent ordinance. The court rejected this argument, stating that *Bryant's* due process ruling is the better rule and the "rule supported by a majority of authorities," and concluded, "In Montana, the salutary statutory scheme comprised of . . . such provisions as section 16-4711, R.C.M. 1947, must be tempered by the fundamental right to notice and the opportunity to be heard."<sup>269</sup> Affording due process to affected landowners prior to enactment of interim zoning may indeed be the better rule. It is a difficult choice whether preserving the status quo pending adoption of permanent zoning is more important than affording landowners notice and hearing prior to enactment of *temporary* zoning ordinances. It is a policy decision and the Montana Supreme Court should not be faulted for opting for the policy of due process protection. The means by which the court backed in to its ultimate decision, however, hardly inspires a great deal of confidence in its reasoning processes.

### C. Zoning Problems in Montana

Several cases decided by the supreme court in recent years deal

267. *Id.* at 484-485; see also *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381 (1925); *McCurley v. City of El Reno*, 138 Okla. 92, 280 P. 467 (1929); *Fowler v. Obier*, 224 Ky. 743, 7 S.W.2d 219 (1928).

268. — Mont. —, 545 P.2d 660 (1976). The author was counsel for defendants in that case.

269. *Id.* at 662.

with recurrent problems in the application of Montana zoning laws. In *Kensmoe v. City of Missoula*,<sup>270</sup> the court ruled on the issue of vested rights under an ordinance pertaining to nonconforming uses of zoned property. In 1941 Sharron Kensmoe and her predecessors in interest placed a trailer house on property in Missoula. Later that year the City enacted section 32-10 of the Missoula City Code, a zoning ordinance relating to nonconforming uses. Kensmoe and her predecessors in interest continued to use the trailer as a dwelling under the nonconforming use section until April, 1965, when the trailer became uninhabitable and was replaced by another trailer. Kensmoe continuously claimed a vested right to maintain the replacement trailer as a home on her property under the nonconforming use provisions of section 32-10, which<sup>271</sup> provided that any lawful use of land or a building existing at the time of the adoption of the ordinance could be continued even if such use did not conform with the provisions of the ordinance, as long as the nonconforming use was not discontinued for a period of two years. The section did not allow structural alterations of a nonconforming building except those required by city ordinance, and those required for restoration of buildings damaged by fire, explosion or certain other disasters.

The City of Missoula contended that replacement of the dilapidated and untenable trailer constituted a structural alteration of a nonconforming building thereby subjecting it to existing zoning regulations. Subsection (d) of 32-10 provided, however, that the ordinance did not apply to: "The existing use of any building, but shall apply to any alterations of a building to provide for its use for a purpose, or in any manner, different from the use to which it was put before the alteration. . . ."<sup>272</sup> Although the court thought it was unclear whether a mobile home was a "building" for purposes of the above exception, it ruled assuming *arguendo* that it was. The opinion found that the specific reference in the above section to the application of the altered building to a "different . . . use" fell under the maxim, *Expressio unius est exclusio alterius*—mention of one thing implies exclusion of another. The court found that Kensmoe had a vested right to a continuous nonconforming use of the new trailer on the same location for the *same use*.

This holding may not be a significant barrier to ordinances properly drafted to phase out nonconforming uses because the holding is specifically limited to the Missoula ordinance as worded. In passing, the court observed:

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270. *Kensmoe v. City of Missoula*, 156 Mont. 401, 480 P.2d 835 (1971).

271. MISSOULA MONT. CODE § 32-10.

272. *Kensmoe v. City of Missoula*, 156 Mont. 401, 480 P.2d 835, 837 (1971).

If the City of Missoula wishes to provide for the eventual attrition of nonconforming structures or land use for residential trailer houses, its zoning ordinances must be amended to so provide.<sup>273</sup>

In 1975 the Montana Supreme Court decided the case of *Wheeler v. Armstrong II*,<sup>274</sup> restating the criteria for judging applications for zoning variances. This case culminated protracted litigation dealing with a mobile home court. In the spring of 1970, the Wheelers, who owned eight acres of land west of Bozeman, after learning there were no regulations prohibiting mobile home courts in the area, began constructing such a court after receiving approval of the Gallatin County Health Office. In the same year other land-owners in the area, who had been trying to establish a zoning district since 1966, filed an action seeking a writ of mandate to force the county commissioners to establish the zoning district. The district court found that the county had in fact created a valid planning and zoning district, but that no development pattern, as required by the statute, had been made; the judge directed such a pattern to be adopted.

Subsequently, on June 12, 1970, the Zoning Board adopted ordinances for the area which defined a rural residential zone and trailer courts as a "conditional use." By that time the Wheelers had moved three trailers onto their land and had obtained permission from the county for installation of septic tanks for three more. During the summer of 1970, the Wheelers continued to move mobile homes onto their property although they had not applied for a conditional use permit required by the ordinance. On March 18, 1971, the Zoning Board obtained an injunction against the Wheelers prohibiting them from further ordinance violations and ordering them to remove all but six of the trailers, for which a nonconforming use had been established. The Wheelers continued to move trailers onto the land in violation of the order and were ultimately cited for contempt.

On July 1, 1971, the Wheelers petitioned the Zoning Board for a variance with respect to the balance of their property. The Zoning Board summarily denied the petition because the petition set forth substantially the same matters litigated at prior hearings. The Wheelers appealed the order to district court which dismissed the appeal on the theory of *res judicata*. The Wheelers then appealed to the Montana Supreme Court. In *Wheeler v. Armstrong I*,<sup>275</sup> the supreme court remanded the case, holding that the Wheelers were

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273. *Id.* at 838.

274. 166 Mont. 363, 533 P.2d 964 (1975).

275. 159 Mont. 392, 498 P.2d 300 (1972).



entitled to a hearing on their petition because a nonconforming use and a variance are not the same, and therefore the prior litigation was not *res judicata*.<sup>276</sup> After the hearing on the variance petition on January 3, 1973, the district court made lengthy findings of fact,<sup>277</sup> and upheld the denial of the variance.

On the second appeal,<sup>278</sup> the supreme court ruled that two earlier Montana cases govern applications for variances.<sup>279</sup> In *Lambros*, the court identified three criteria a petition for variance must meet:

- 1) The variance must not be contrary to the public interest;
- 2) A literal enforcement of the zoning ordinance must result in unnecessary hardship, owing to conditions unique to the property; and
- 3) The spirit of the ordinance must be observed, and substantial justice done.<sup>280</sup>

The *Wheeler II* court noted it was necessary only to ascertain whether there was substantial and competent evidence to sustain the district court action.<sup>281</sup> After reviewing the evidence and findings of fact of the district court, the supreme court concluded there was sufficient evidence to show that the denial of the variance was proper.<sup>282</sup>

The doctrine of equitable estoppel has played a significant role in three recent Montana zoning cases.<sup>283</sup> The controversy in *State ex rel. Barker v. Town of Stevensville*, arose after the Mayor of Stevensville informed a landowner's agent that a building permit had been issued when, in fact, it had not. The landowners, in reliance on this representation, located a mobile home on their property. The town council subsequently rejected the building permit application, which resulted in a substantial loss to the concerned landowners. The district court rejected a petition by the landowners for a writ of mandate to compel issuance of the building permit. On appeal, the supreme court reversed, holding that the town, by its actions and representations, was estopped from denying the permit. The court stated: "We are aware of the great weight of authority holding that a municipal corporation is not bound by acts or state-

276. *Id.* at 304.

277. A portion is reprinted in *Wheeler v. Armstrong II*, 166 Mont. 363, 533 P.2d 964, 966-67 (1975).

278. *Id.* at 967.

279. *Lambros v. City of Missoula*, 153 Mont. 20, 452 P.2d 398 (1969); *Freeman v. Board of Adjustment*, 97 Mont. 342, 34 P.2d 534 (1934).

280. *Wheeler v. Armstrong II*, 166 Mont. 363, 533 P.2d 964, 967 (1975).

281. *Id.* at 966.

282. *Id.* at 967.

283. *State ex rel. May v. Hartson*, \_\_\_\_ Mont. \_\_\_\_, 539 P.2d 376 (1975); *State ex rel. Russell Center v. Missoula*, 166 Mont. 385, 533 P.2d 1087 (1975); *State ex rel. Barker v. Town of Stevensville*, 164 Mont. 375, 523 P.2d 1388 (1974).

ments of its agents or officers in excess of their authority, even where a third party has relied thereon to his detriment."<sup>284</sup> The court rejected this authority, finding it inequitable. The court instead adopted the following approach:

In cases of this kind there should be a balancing of the municipal corporation's unwarranted assumption of risk of liability for acts or statements of its agents or employees made in excess of their authority against the harm done to good faith, innocent and unknowledgeable third parties who act in reliance upon those representations. It follows that each case will necessarily have to be judged upon its own unique factual situation.<sup>285</sup>

The second case involving the doctrine of equitable estoppel, *State ex rel. Russell Center v. Missoula*,<sup>286</sup> concerned a building permit issued for a proposed shopping center in Missoula. The appellant, Russell Center, was the owner of a 38.79 acre tract, 32.78 acres of which were zoned commercial, the remaining 6.01 acres were zoned for residential planned unit development. On October 15, 1973, the Missoula City Council adopted a resolution of intention to rezone the commercial area to residential, and referred the matter to its zoning commission.

On October 24, 1973, the appellant applied for a building permit and an off-street parking permit for the proposed shopping center. The P.U.D. zoned area was to be utilized for the parking. On November 2, 1973, the city building inspector issued a building permit to appellant, without the off-street parking permit. On November 5, the City Council revoked the building permit by resolution; the appellant was notified of such action on November 6. Three days later the appellant filed an action seeking, *inter alia*, writs of mandate directing the city to issue a new permit to replace the revoked permit and to issue a parking permit. When the district court dismissed the petition for such writs, Russell Center appealed.

The district court had concluded that relief could not be granted because the building permit issued by the building inspector was void for three reasons. On appeal, the supreme court agreed. The first reason was that the permit was issued without reasonable compliance with a section of the Missoula City Code which provided that the building inspector could issue a permit only after determining compliance with the building code. Yet the building inspector was informed by the city engineer prior to the issuance of the permit that the plans submitted by appellant for the parking area violated

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284. *State ex rel. Barker v. Town of Stevensville*, 164 Mont. 375, 523 P.2d 1388, 1390 (1974).

285. *Id.* at 1391.

286. *State ex rel. Russell Center v. Missoula*, 166 Mont. 375, 523 P.2d 1388, 1390 (1974).

several code provisions.<sup>287</sup>

The second reason was that the proposed use of the area zoned residential planned unit development for off-street parking, would violate a zoning ordinance. The six acre tract authorized for parking by the permit had been zoned residential in 1972. Appellant's plan, providing for commercial development parking in the area zoned for residential development, obviously did not conform to the ordinances. Since the code charged the building inspector with determining compliance with all applicable laws and regulations prior to issuance of a permit, he was, on the facts of the case, not authorized to issue the permit. In addition, if the six acres were excluded from the proposed permit, the entire plan would fail for not providing adequate parking facilities.<sup>288</sup>

The third reason the permit was void was that it rezoned the six acre tract without proper procedures. The court recognized that the permit authorized the change in use of the tract from residential development to commercial parking, and stated:

To effect such a change, the provisions of section 11-2705, R.C.M. 1947, together with section 11-2704, should have been implemented. This would have required notice of the proposed change, a hearing, and, in case of protest, a favorable vote of three-fourths of the city council. These requirements were not met in any way, prior to the issuance of the permit.

A building permit issued in violation of a municipal ordinance or other statute is void ab initio and creates no legal rights.<sup>289</sup>

The court rejected appellant's plea that the city be estopped from revoking the building permit, holding there was no evidence that the city had given appellant assurance that a building permit would be issued in any event, or that the PUD area could be used for parking. The court noted that appellant had expended no funds in reliance on any assurance from the city.<sup>290</sup> The court felt that *even if* the appellant had, in fact, relied upon representations by the city, the final answer to any estoppel argument would depend on a matter of balancing the interest of the municipality against that of the appellant. On this point, the court referred to the test enunciated in *Barker*.

The court reached a different result in the third estoppel case, *May v. Hartson*.<sup>291</sup> In contrast to the decision in *Russell Center*, the supreme court used the rationale of *Barker* to hold that the city of

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287. *Id.* at 1089.

288. *Id.* at 1090.

289. *Id.*

290. *Id.* at 1094.

291. *State ex rel. May v. Hartson*, \_\_\_\_ Mont. \_\_\_\_, 539 P.2d 376 (1975).

Havre was estopped from revoking its building permit after the builders had detrimentally relied on it. *May v. Hartson* concerned a zoning ordinance adopted by the city of Havre in August, 1974. Two parties took options in December, 1974, on two parcels of land for the purpose of building two twelve-plex apartment houses. The land was located in an area zoned commercial-local. In mid-January, 1975, these builders contacted the office of the city engineer and building inspector in Havre. This office outlined the requirements for building set-backs upon which the builders relied in preparing their site and plans for the buildings. Thereafter, the builders exercised their option to purchase the parcels of land in question, reviewed their plans with the city building inspector, and even consented to changes requested by the inspector to bring the buildings in conformance with the Uniform Building Code. On February 4, 1975, building permits were issued for each of the apartment houses. Work progressed at a rapid pace thereafter. With excavation done, foundation footings poured, the daylight basement partitions and exterior walls finished to the second floor, the project was one-third completed.

On March 21, 1975, the city building inspector informed the construction foreman that there was a possible error in the building setback from the alley; the builders were not requested to stop work or change the buildings in any manner. On March 25, 1975, the city engineer determined that the buildings were a commercial use and were in compliance with the zoning ordinance. The following day various residents of the area petitioned the district court to issue a writ of mandate requiring the building inspector to issue written notice to the builders that the buildings failed to conform with the set-back requirements of the zoning ordinance. The builders intervened in the suit, and after a hearing, the district court concluded that the city was estopped from taking the action which the residents desired, and decreed the residents' application be denied and the alternative writ of mandate be quashed.

On appeal the Montana Supreme Court affirmed the district court's denial of the writ of mandate, holding that mandamus was inappropriate because appellants had not demonstrated that they had no speedy and adequate remedy at law. The court pointed out that decisions of the "enforcing officers" could be appealed to the Board of Adjustment "as provided in the law of the State of Montana."<sup>292</sup> Alternatively, the court found that the doctrine of equitable estoppel barred the city from revoking its building permit,<sup>293</sup>

292. *Id.* at 379. R.C.M. 1947, § 11-2707(3) through (6) (Supp. 1975), provides the right of appeal to the Board of Adjustment.

293. *State ex rel. May v. Hartson*, \_\_\_ Mont. \_\_\_, 539 P.2d 376, 380 (1975).

citing its holding in *Barker* as authority.

General observations on the estoppel cases are difficult since the thrust of *Barker* is "that each case will necessarily have to be judged upon its own unique factual situation."<sup>294</sup> It is clear, however, that the doctrine of equitable estoppel is viable in Montana and that the courts will not hesitate to estop local governments if landowners have detrimentally relied upon representations of agents of those governments.

#### D. *The Impact of the 1972 Montana Constitution*

Although no zoning litigation has fallen squarely under the 1972 Montana Constitution, some discussion of the "local government" section<sup>295</sup> of that constitution is merited since it may reverse certain early zoning cases.<sup>296</sup>

The 1972 Montana Constitution substantially expanded and liberalized the powers of local government. Section 4 of Article XI, "Local Government" provides that: "(1) A local government unit without self-government powers has the following general powers: . . . (b) A county has legislative, administrative, and other powers provided or implied by law. . . ." Furthermore, Article XI, Section 4(2) states: "The powers of incorporated cities and towns and counties shall be liberally construed."

Prior to the 1972 Constitution, § 16-801, R.C.M. 1947, the basic statutory source of county power, had been authoritatively construed in a number of Montana cases as meaning the counties can only exercise such powers as are expressly granted by the State, together with the implied powers necessary for the execution of powers expressly granted.<sup>297</sup>

The 1972 Montana Constitution modifies this rigid rule and provides that the powers of local government shall be liberally construed. In discussing the Committee on Local Government's recommendation on Subdivision 4 (3) of Article XI (that Courts shall liberally construe county's powers) Delegate Arness specifically referred to three Montana cases relating to the issue.<sup>298</sup> It is clear from the Arness presentation that the convention intent was to change the thrust of these rulings and to expand the powers of the counties,

294. *State ex rel. Barker v. Town of Stevensville*, 166 Mont. 375, 523 P.2d 1388, 1391 (1974).

295. MONT. CONST. art. XI.

296. *E.g.*, *Plath v. Hi-Ball Contractors, Inc.*, 139 Mont. 263, 362 P.2d 1021 (1961); *City of Missoula v. Missoula County*, 139 Mont. 256, 362 P.2d 539 (1961); *Bacus v. Lake County*, 138 Mont. 69, 354 P.2d 1056 (1960).

297. *Id.*

298. *Id.*

allowing them to exercise legislative as well as ministerial powers.<sup>299</sup> Specifically, in regard to zoning powers, Delegate Arness commented:

I think that it is the opinion of the majority of the Committee that the Courts should be encouraged to look with liberality upon attempts by counties to zone and to otherwise function in the areas of zoning and planning.<sup>300</sup>

. . . .  
In summary, then, I think it is fair to say that they [the amendments to the local government article] are a restatement of what we presently have; and that the two points of departure are, one, the statement that the legislature may delegate certain legislative powers to counties. Obviously, the legislature is the one to do it, and the delegation, I think, would be a delegation that would be in conformity to those standards that have already been determined judicially. And, second, an invitation to the courts, I suppose, or an instruction to the courts, to liberally construe the powers of cities and counties.<sup>301</sup>

Directly after the above report by Delegate Arness, the Convention passed Section 4 of Article XI, with no opposition.<sup>302</sup> Thus, it appears that the 1972 Montana Constitution authorized the liberal delegation of legislative powers to the counties in fields such as zoning. Article XI of the 1972 Montana Constitution authorizes local government units to opt for self-government charters. Those that do adopt self-government charters will have even broader powers in such fields as planning and zoning, and the early Montana case law rigidly limiting the discretionary power of local units of government will have even less application.

### VIII. PROTECTION OF NATURAL AREAS

The past several legislative assemblies have enacted a number of environmental provisions relating to land use. The Natural Areas Act of 1974<sup>303</sup> provides for the preservation of state-owned lands of scenic, ecological, and scientific value. The 1975 legislature substantially amended the former Open-Space Land Act<sup>304</sup> to provide for the preservation of open-space land through the device of a "conservation easement." That legislature also enacted lakeshore and stream bed protection measures.<sup>305</sup> Because no reported Montana

299. X Transcript of Proceedings of 1972 Montana Constitutional Convention 7695-99.

300. *Id.* at 7699.

301. *Id.* at 7699 and 7700.

302. *Id.* at 7701.

303. R.C.M. 1947, §§ 81-2701 through 2713 (Supp. 1975).

304. Laws of Montana (1969), ch. 337, § 1.

305. R.C.M. 1947, §§ 89-3701 through 3712 (Supp. 1975); R.C.M. 1947, §§ 26-1510

cases have interpreted these measures, it is too early to judge their effectiveness. Each Act potentially will contribute to better land use in Montana.

### A. *The Natural Areas Act*

The legislative intent of the "Natural Areas Act of 1974" is set forth as follows:

The legislative assembly finds that in the expanses of Montana there are natural areas possessing significant scenic, educational, scientific, biological, and/or geological values, or areas possessing these characteristics to a degree promising their restoration to a natural state; that since the development of these areas is an irreversible commitment of a finite and diminishing resource of fundamental importance, the remaining areas should be preserved for the benefit of this and future generations; and that currently there are no regulations promulgated by the state or local governments to ensure adequate protection for natural areas. It is the intention of the legislative assembly to establish a system for the protection of natural or potentially natural areas in order to preserve their natural ecosystem integrity in perpetuity.<sup>306</sup>

The Act defines "natural areas" as those areas of land in which the visual aspects of human intrusion are not dominant and which have one or more of the following characteristics: "(a) an outstanding mixture or variety of vegetation, wildlife, water resource, landscape and scenic values. (b) An important or rare ecological or geological feature or other rare or significant natural feature worthy of preservation for scientific, education or ecological purposes."<sup>307</sup> The Board of Land Commissioners, the Department of State Lands, and a "Natural Areas Advisory Council" created by the Act<sup>308</sup> are responsible for implementing the Natural Areas Act.

Land may become subject to administration as a natural area by any one of the following methods: designation by the Board of Land Commissioners if the land is controlled by the Board; acquisition by the Board of land or interests in land sufficient to protect the area's natural character with the consent of the property owner; gifts accepted by the Board; exchange of state-owned trust land for land which qualifies as a natural area; and designation by the legislature of lands owned by the State of Montana.<sup>309</sup> Use of eminent domain powers by the Board is explicitly prohibited except in spe-

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through 1523 (Supp. 1975).

306. R.C.M. 1947, § 81-2702 (Supp. 1975).

307. R.C.M. 1947, § 81-2703 (Supp. 1975).

308. R.C.M. 1947, § 81-2710 (Supp. 1975).

309. R.C.M. 1947, § 81-2704 (Supp. 1975).

cific instances where authorized by the legislative assembly.<sup>310</sup> An area cannot be designated as a natural area by the Board unless a public meeting is held, and affected landowners and lessees are notified.<sup>311</sup>

Once an area is designated a natural area, it is protected from condemnation or other development "adversely affecting the integrity of the natural area" unless the legislature specifically authorizes such condemnation or development.<sup>312</sup> However, land uses in existence at the time of the natural area designation may continue.<sup>313</sup> The Natural Areas Act directs the Board of Land Commissioners to enact comprehensive protective regulations for natural areas<sup>314</sup> and directs the Department of State Lands to establish and utilize procedures to identify potential natural areas.<sup>315</sup> The Board of Land Commissioners must submit to each legislative assembly an annual report on its designation and acquisition activities.<sup>316</sup>

The Natural Areas Act is well designed to preserve lands with natural, scenic, scientific, and educational value. A significant problem, however, may render the Act essentially impotent. Among the lands specifically eligible for natural area designation are school trust lands. The statement of legislative intent directly addresses this issue:

In this connection, the legislature recognizes the fact that the school trust lands are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of the state; that it is the duty of the board of land commissioners to administer this trust so as to secure the largest measure of legitimate and reasonable advantage to the state; and hereby declares the preservation of natural areas, whether trust or other lands, for the enjoyment and inspiration of future generations, to be an object worthy of legislative action helpful to the well-being of the people of the state and also declares that the preservation of natural areas on state trust lands has sufficient value to present and future education to meet the state's obligation for the disposition and utilization of trust lands as specified in the Enabling Act.<sup>317</sup>

The Enabling Act of 1889,<sup>318</sup> which created the State of Montana,

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310. R.C.M. 1947, § 81-2707 (Supp. 1975).

311. R.C.M. 1947, § 81-2709 (Supp. 1975).

312. R.C.M. 1947, § 81-2708(1) (Supp. 1975).

313. R.C.M. 1947, § 81-2708(2) (Supp. 1975).

314. R.C.M. 1947, § 81-2709 (Supp. 1975).

315. R.C.M. 1947, § 81-2705 (Supp. 1975).

316. *Id.*

317. R.C.M. 1947, § 81-2702 (Supp. 1975).

318. Act of February 22, 1889 (25 Stat. 676, ch. 180).



granted certain tracts of land within each township in the State "for the support of common schools."<sup>319</sup> The Act established strict guidelines for the "disposition" of these school trust lands or any interest therein. Briefly stated, in disposing of any of these lands, the Act requires that the State receive "the full market value of the estate or interest disposed of."<sup>320</sup> The 1972 Montana Constitution, in accordance with the Enabling Act, states that "[t]he public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion."<sup>321</sup> The state constitution places the school lands granted to the state in 1889 by the federal government in trust for the support of common schools. Both the 1972 Constitution and the Enabling Act mandate application of all proceeds from the disposition of these grant lands to common, or public, school land.

The resulting issue is whether the designation of school trust land as natural areas without monetary compensation would violate the Enabling Act or the 1972 Montana Constitution. In July 1976, the Montana Attorney General rendered an opinion on this issue:<sup>322</sup>

So that the state will not commit a breach of trust under the Enabling Act and Montana Constitution, the state must actually compensate its school trust in money for the full appraised value of any school trust lands designated as or exchanged for natural areas pursuant to the Montana Natural Areas Act of 1974. Such compensation can only be avoided by securing the consent of Congress.<sup>323</sup>

In rendering his opinion the Attorney General relied heavily upon the case of *Lassen v. Arizona*.<sup>324</sup> *Lassen* considered whether the State of Arizona, pursuant to the New Mexico-Arizona Enabling Act, was obligated to compensate the school trust for school trust lands taken for highway purposes. After reviewing the terms and legislative history of the Act and concluding that its restrictions were intended to guarantee the school trust appropriate compensation for trust lands,<sup>325</sup> the *Lassen* court wrote: "We hold therefore that Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights of way which it obtains on or over trust lands. This standard . . . most consistently reflects the essential purposes of the grant."<sup>326</sup>

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319. *Id.* § 10.

320. *Id.* § 11.

321. MONT. CONST. art. X, § 3.

322. 36 OP. ATT'Y. GEN. MONT. No. 92 (1976).

323. *Id.*

324. *Lassen v. Arizona*, 385 U.S. 458 (1967).

325. *Id.* at 464.

326. *Id.* at 469-70.

There are some critical differences between the facts in *Lassen* and the facts relating to the Montana Natural Areas Act. The Attorney General's treatment of these differences is not satisfactory and the ultimate conclusion is questionable. In *Lassen*, the state school trust lands were transferred to the highway department for the purpose of road right-of-way. This inter-agency transfer changed the land use in perpetuity from school trust purposes to highway right-of-way purposes. The Montana Natural Areas Act, on the other hand, does not contemplate an inter-agency transfer or "disposition" of school trust lands. Rather, it provides that the same agency, the Board of Land Commissioners, maintains jurisdiction over the lands, and that such lands could be "designated" and administered as natural areas. Such designation would not be in perpetuity; it could be changed at a later date.

Furthermore, the legislative declaration in the Natural Areas Act indicates that the classification of trust lands of scenic, biological, educational or scientific value is consistent with the educational purposes for which the trust was established.<sup>327</sup>

In implementing the Natural Areas Act, the Department of State Lands undoubtedly will follow the Attorney General's opinion and will not designate state lands as natural areas unless the legislature appropriates funds to pay the appraised market value of such lands. A successful court challenge of the Attorney General's opinion could reinstate the original intent of the legislature—the designation of appropriate state trust lands as natural areas. Only if such trust lands can be designated as natural areas without monetary compensation will the Act effectively preserve natural areas throughout Montana.

### B. *Conservation Easements*

The 1975 legislature substantially amended the Open-Space Land Act and changed its title to the "Open-Space Land and Voluntary Conservation Easement Act."<sup>328</sup> The 1975 amendments provided that governments and qualified private organizations<sup>329</sup> could acquire less than fee interests in land for the purpose of preserving open or natural characteristics. "Conservation easement" is defined as:

. . . an easement or restriction running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction, any or all rights to construct

327. R.C.M. 1947, § 81-2702 (Supp. 1975).

328. R.C.M. 1947, §§ 62-601 through 618 (Supp. 1975).

329. R.C.M. 1947, § 62-603(f) (Supp. 1975).

improvements upon the land or to substantially alter the natural characters of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land. . . .<sup>330</sup>

Conservation easements may be granted either in perpetuity or for a term not less than fifteen (15) years.<sup>331</sup> In connection with these amendments to the Open-Space Land Act, the legislature amended the statutes dealing with servitudes to allow for conservation easements.<sup>332</sup> These amendments eliminated the common law problem of lack of enforceability of negative easements in gross, that is, easements not appurtenant to the land. An enforcement section was added: "no conservation easement shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of such conservation easement not being an appurtenant easement or because such easement is an easement in gross."<sup>333</sup> The conservation easement amendments provide for review and comment by the local planning authority prior to conveyance of the conservation easement. The comments of the planning authority on the propriety of the proposed conservation easement are not binding.<sup>334</sup>

The purpose of the conservation easement legislation is to provide a device, both to governments and to private organizations, for preserving the open-space character of the land without purchase of the fee simple interest. This device appears particularly appropriate for agricultural land. By granting a conservation easement, the agricultural landowner gives up the right to develop the land, yet continues devoting the land to agriculture. The landowner receives the advantage of the property tax provision that the land be assessed at the value of its restricted use.<sup>335</sup> There is also an estate tax benefit to the agricultural user who conveys development rights in that the property will be appraised at its agricultural use level rather than at its potential development level.

It is too early to judge the effectiveness of the conservation easement legislation. Because the entire approach is based on voluntary action by landowners, it is doubtful that a large amount of open space land will be preserved by use of these provisions. The Act's primary attraction is the provision of an inexpensive method to preserve open space.

330. R.C.M. 1947, § 62-603(e) (Supp. 1975).

331. *Id.*

332. R.C.M. 1947, §§ 67-601 and 67-602 (Supp. 1975).

333. R.C.M. 1947, § 62-612 (Supp. 1975).

334. R.C.M. 1947, § 62-614 (Supp. 1975).

335. R.C.M. 1947, § 62-608 (Supp. 1975).

### C. Lakeshore Protection

By enacting the Lakeshore Protection Act,<sup>336</sup> the 1975 Montana Legislature implemented a policy of conserving and protecting the natural lakes of the State by conferring upon local governments statutory powers to protect lake areas. This act requires any person proposing a project which will alter or diminish the course, current, or cross-sectional area of a lake or lakeshore<sup>337</sup> to secure a permit from the local governing body.<sup>338</sup> The Act applies to all natural lakes having a water surface area of at least 160 acres for at least six months in a year of average precipitation.<sup>339</sup> A local governing body may decrease this minimum size to include natural lakes no smaller than twenty acres.<sup>340</sup> A list of specific activities which<sup>341</sup> will require a permit under the Act includes: construction of channels and ditches; dredging of lake bottoms; lagooning; gilling; constructing breakwaters of pilings; construction of wharves and docks.<sup>342</sup>

The Act mandates every governing body having jurisdiction over an area containing a lake to adopt regulations in the form of criteria for issuance or denial of such permits.<sup>343</sup> Upon petition of either five owners or thirty percent of the landowners abutting a lake, the Department of Natural Resources and Conservation may adopt regulations for the particular lake, and then exercise the powers conferred by this Act until the local governing body adopts the necessary regulations.<sup>344</sup> The regulations must favor issuance of the permit if the proposed project will not: materially diminish water quality or habitat for fish and wildlife, interfere with navigation or other lawful recreation, create a public nuisance, or impair scenic values of the predominant landscape.<sup>345</sup> A local governing body may adopt stricter or additional regulations if authorized by other statutes,<sup>346</sup> and may provide a summary procedure to permit work which insignificantly affects a lakeshore.<sup>347</sup>

Upon application for a permit, the local governing body must determine whether the proposed project meets the criteria for issu-

336. R.C.M. 1947, §§ 89-3701 to 3712 (Supp. 1975).

337. Defined in R.C.M. 1947, § 89-3702(2) (Supp. 1975), as the perimeter of a lake when the lake is at mean annual high water elevation, including the land within twenty feet from that elevation.

338. Defined in R.C.M. 1947, § 89-3702(4) (Supp. 1975).

339. R.C.M. 1947, § 89-3702(1) (Supp. 1975).

340. *Id.*

341. Defined in R.C.M. 1947, § 89-3702(3) (Supp. 1975).

342. R.C.M. 1947, § 89-3703 (Supp. 1975).

343. R.C.M. 1947, § 89-3704(1) (Supp. 1975).

344. R.C.M. 1947, § 89-3704(6) (Supp. 1975).

345. R.C.M. 1947, § 89-3704(2) (Supp. 1975).

346. R.C.M. 1947, § 89-3704(5) (Supp. 1975).

347. R.C.M. 1947, § 89-3704(3) (Supp. 1975).

ance of a permit.<sup>348</sup> Although the Act does not specifically so state, it appears that the governing body may grant a conditional permit in some cases.<sup>349</sup> In addition, a governing body apparently may grant a variance from its regulations upon the preparation and distribution of an environmental impact statement.<sup>350</sup>

The penalty provisions of the Act are twofold. First, any person who performs work without a permit after May 1, 1975, the effective date of the Act,<sup>351</sup> may be required to restore the lake to its original condition.<sup>352</sup> Second, a person who violates an order issued under the Act or who knowingly violates a regulation, is subject to a jail sentence or a fine.<sup>353</sup> A state district court has jurisdiction to hear and decide three types of cases arising under the Act: a complaint and petition of a governing body or an interested person for an order to restore a lake to its previous condition or to enjoin further work; a petition for review of the final action of a governing body upon an application for a permit; and a petition for review of the regulations of a governing body.<sup>354</sup>

The Act offers little in the way of a meaningful solution to the problem of lakeshore development. First, there is no supervising entity to ensure compliance with the Act. Although the Department of Natural Resources and Conservation may adopt regulations if a local governing body does not, the Act provides no means of communication between the department and a local governing body as to whether such regulations have in fact been adopted.<sup>355</sup> Second, the Act provides that local governing bodies may grant conditional permits or allow a variance from their regulations, yet the Act provides no criteria for such action. Finally, the minimum requirements stated in the Act for the issuance of permits are indeed minimal.<sup>356</sup> Detailed specification of these criteria is necessary.

The major problem of the Lakeshore Protection Act is its extremely limited scope. It does little more than regulate dredge and fill, and wharf-building activities. It can scarcely be considered a

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348. R.C.M. 1947, § 89-3705 (Supp. 1975).

349. R.C.M. 1947, § 89-3706 (Supp. 1975).

350. R.C.M. 1947, § 89-3707 (Supp. 1975).

351. Laws of Montana (1975), ch. 527, § 14.

352. R.C.M. 1947, § 89-3708(1) (Supp. 1975).

353. R.C.M. 1947, § 89-3711 (Supp. 1975).

354. R.C.M. 1947, § 89-3710 (Supp. 1975).

355. As of November 1976, the Department was not aware of any regulations having been adopted by any local governing body in the state, although Flathead County was in the process of developing some at one time. Further, the department has received no petitions from landowners requesting them to adopt regulations because of the failure of the local governing bodies to do so. Telephone conversation with Ted Doney, chief legal counsel for the Department of Natural Resources and Conservation, November 8, 1976.

356. R.C.M. 1947, § 89-3704(2) (Supp. 1975).

significant piece of land use legislation. A much stronger measure, "An Act to Provide for the Protection and Enhancement of Shoreland Areas"<sup>357</sup> passed the House of Representatives in the 1975 session but was killed in the Senate. That legislation applied to "reservoirs" of more than two hundred acres, "ponds", and lakes if identified by the Department of Natural Resources and Conservation as having environmentally critical shoreland areas. It directed counties to zone land within five hundred feet of the normal low-water elevation of lakes, ponds and reservoirs. If counties failed to act, the Department of Natural Resources and Conservation was to zone the area. The proposed act specified environmental criteria for the zones. It is unfortunate that this measure, which is potentially much more effective than the limited Lakeshore Protection Act, was not passed.

#### D. Streambed Preservation

By enacting "The Natural Streambed and Land Preservation Act of 1975,"<sup>358</sup> the Montana legislature declared it public policy that this state's natural rivers and streams be preserved in their natural or existing condition.<sup>359</sup> A person<sup>360</sup> planning a project<sup>361</sup> which would physically alter the natural or existing condition of a stream<sup>362</sup> is required to give written notice<sup>363</sup> to the appropriate board of supervisors.<sup>364</sup>

R.C.M. 1947, § 26-1514 (Supp. 1975) provides for review of the proposed activity. The procedure begins with a determination by the supervisors whether the proposed activity is in fact a "project" requiring further regulation. If the activity is a "project", the Department of Fish and Game may require that an on-site inspection team be allowed to make recommendations to the supervisors. If an inspection is not requested, the supervisors may deny or approve the project, or make recommendations to the applicant for alternative

357. H.B. 153, 44th Legislature, 2d Sess., 1975.

358. R.C.M. 1947, §§ 26-1510 to 1523 (Supp. 1975).

359. R.C.M. 1947, § 26-1511 (Supp. 1975).

360. "Person" is defined in R.C.M. 1947, § 26-1512(2) (Supp. 1975) to mean: any natural person, corporation, firm, partnership, association or other legal entity not covered under section 26-1502 [an agency of state government, county, municipality, or other subdivision of the state of Montana].

These governmental entities are regulated as to alteration of natural streams by the Department of Fish and Game pursuant to R.C.M. 1947, §§ 26-1501 to 1509.

361. "Project" is so defined in R.C.M. 1947, § 26-1512(5) (Supp. 1975).

362. "Stream" is defined in R.C.M. 1947, § 26-1512(1) (Supp. 1975), as "any natural perennial flowing stream, or river, its bed and immediate banks."

363. R.C.M. 1947, § 26-1513 (Supp. 1975).

364. "Supervisors" is defined in R.C.M. 1947, § 26-1512(4) (Supp. 1975), to be the board of supervisors of a conservation district, the directors of a grass conservation district, or the board of county commissioners.

plans. If an inspection is conducted, the supervisors are to affirm, overrule, or modify the inspection team recommendations. A team member in disagreement with the supervisor's action, may request an arbitration panel.<sup>365</sup> The Act provides further:

If the final decision of the arbitration panel requires modifications or alterations from the original project plan, as approved by the supervisors, then the arbitration panel shall include in its decision any part or percent of these modifications or alterations that is for the direct benefit of the public and it shall assign any costs to the proper participant.<sup>366</sup>

Any final action under the Streambed Act may be appealed to the district court.<sup>367</sup>

The Streambed Act also provides an emergency procedure: "[t]he provisions of this act shall not apply to those actions which are necessary to safeguard life or property, including growing crops, during periods of emergency."<sup>368</sup> A person taking emergency action must notify the supervisors who then request an inspection team to make an on-site inspection and report to the supervisors regarding the emergency action. The emergency procedure also provides for arbitration. Approval of proposed projects or alternate plans does not relieve the applicant of responsibility for compliance with the Floodplain Management Act,<sup>369</sup> nor does the Streambed Act impair, diminish, divest or control any existing or vested state or federal water rights.<sup>370</sup>

An integral part of the Streambed Act concerns the adoption by the Board of Natural Resources and Conservation of rules setting minimum standards.<sup>371</sup> In addition, the Streambed Act requires the supervisors of each district to adopt rules setting project standards, which rules are to meet or exceed the minimum standards set by the Board of Natural Resources and Conservation.<sup>372</sup> The Board adopted such minimum standards on June 26, 1975.<sup>373</sup> The Department of Natural Resources and Conservation has compiled model rules for adoption by conservation districts, grazing districts, and counties.

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365. Pursuant to R.C.M. 1947, § 26-1515 (Supp. 1975), the arbitration panel shall consist of three members chosen by the senior judge of the judicial district in which the dispute occurs. The members must be residents of that judicial district at the time of selection.

366. R.C.M. 1947, § 26-1518 (Supp. 1975).

367. R.C.M. 1947, § 26-1521 (Supp. 1975).

368. R.C.M. 1947, § 26-1517(1) (Supp. 1975).

369. R.C.M. 1947, § 26-1519 (Supp. 1975).

370. R.C.M. 1947, § 26-1516 (Supp. 1975).

371. R.C.M. 1947, § 26-1520(1) (Supp. 1975).

372. *Id.*

373. The minimum standards are found in MAC, §§ 36-2.2(2)-S210 to 36-2.2(2)-S260.

Each of the districts has adopted the model rules with only slight variations.<sup>374</sup>

The Streambed Act contemplates two methods of enforcement. R.C.M. 1947, § 26-1522 (Supp. 1975) declares: "Except for emergency action, a project engaged in by any person without prior approval, as prescribed in this act, is declared a public nuisance and subject to proceedings for immediate abatement." In addition, the Act imposes misdemeanor fines for initiation of a project without consent of the supervisors and for violation of time provisions of the Act, and invests courts with the discretion to order restoration for damage to a stream.<sup>375</sup>

The Streambed Act suffers minor drawbacks. The Act fails to specify minimum qualifications of inspection team members, nor does the Act set forth relevant qualifications for the arbitration panel. Nonetheless, the Act is a necessary improvement.

## IX. CONCLUSION

Montana's real estate and land use planning law is as complex as it is extensive. In many areas, such as subdivision review, annexation, and protection of natural areas, the Montana legislature has established procedures to protect our urban and rural environment. In other areas, most notably the development of a statewide comprehensive land use policy, more legislative work is necessary. As Montana courts, administrative agencies, and lawyers gain more experience in working with land use legislation, all citizens of the State will benefit from coordinated and thorough long-range planning for the use of Montana's land resources.

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374. Correspondence from Parham T. Hacker, Environmental Coordinator, Department of Natural Resources and Conservation, November 16, 1976.

375. R.C.M. 1947, § 26-1523 (Supp. 1975).



